

***United States Court of Appeals
for the Second Circuit***



APPENDIX

(Corrected)
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77-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067,
77-4068, 77-4073,
77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

AND UNITED STATES OF AMERICA,

Respondents,

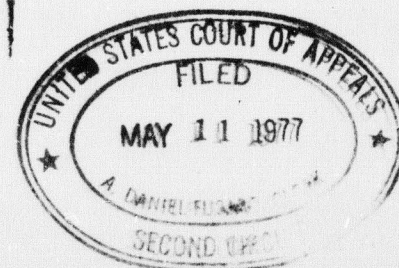
MCI TELECOMMUNICATIONS CORP., ET AL.,

Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

JOINT APPENDIX TO THE BRIEFS

VOLUME V



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JOINT APPENDIX TO THE BRIEFS

VOLUME V

	<u>Page</u>
Reply Comments of MCI Telecommunications Corporation, MCI-New York West, Inc., Interdata Communications, Inc. and Microwave Communications, Inc. filed February 2, 1975.	1034
Letter from Counsel for International Business Machines Corporation filed February 24, 1975	1062
Reply Comments of the National Retail Merchants Association, Inc. filed February 24, 1975	1063
Transmittal Letter and Comments of Office of Telecommunications Policy, in Docket No. 20097, Regulatory Treatment of Communications Brokerage dated February 24, 1975	1089
Reply Comments of the Utilities Telecommunications Council filed February 24, 1975.	1144
Reply Comments of American Telephone and Telegraph Company filed February 24, 1975	1155
Reply Comments of Telenet Communications Corporation dated February 24, 1975	1170
Reply Comments of American Trucking Associations, Inc. filed February 24, 1975	1186
Reply Comments of the Central Committee on Telecommunications of the American Petroleum Institute filed February 24, 1975	1209
Reply Comments of United System Service, Inc. on Behalf of Member Companies of the United Telephone System filed February 24, 1975	1217
Reply Comments of Aeronautical Radio, Inc., and The Air Transport Association of America filed February 24, 1975	1227

Reply Comments of the Securities Industry Automation Corporation filed Feb- ruary 24, 1975	1251
Transmittal letter and Petition to Intervene of National Library of Medicine filed April 25, 1975	1268
Response of the Securities Industry Automation Corporation filed April 25, 1975	1274

SECRETARY

REPLY COMMENTS OF
MCI TELECOMMUNICATIONS CORPORATION,
MCI-NEW YORK WEST, INC., INTERDATA
COMMUNICATIONS, INC., AND MICROWAVE
COMMUNICATIONS, INC.

MCI Telecommunications Corporation, MCI-New York West, Inc., Interdata Communications, Inc., and Microwave Communications, Inc. (hereinafter referred to collectively as MCI), by their attorneys, hereby submit their reply comments in the above matter. 1/

1. After a review of the comments of all parties to this proceeding, MCI retains its basic position on the issues of resale, sharing, and single customer use as set forth in its initial comments. The summary of that position, as stated in the MCI comments, pp. 3-4, is as follows:

1/ Due to the press of other business in its office, including involvement in other matters before the Common Carrier Bureau, counsel for MCI submits these reply comments in a more skeletal fashion than would have been the case within a longer time frame. In this regard, it should be noted that MCI concurred in the motion of Western Union for an extension of time in which to file these reply comments. If the Commission wishes, MCI is willing to supplement these reply comments, and will, in any event, amplify its views in the later stages of this proceeding.

- (a) Entities wishing to buy facilities from common carriers and then resell them to others at a profit should be regulated as common carriers, just as they would be if they built their own facilities in order to achieve the same objective.
- (b) Entities wishing to share facilities which they purchase jointly from a common carrier should be allowed to do so--but only subject to rules similar to those set forth on Page 11 of the Notice (i.e., those applicable to cooperative use of fixed radio stations in the Land Transportation Services) in order to insure that the arrangement is a bona fide one, with the parties dividing the costs in proportion to use and no one making a profit from the operation.
- (c) The single customer concept embodied in Section 2.2.1 of AT&T's Tariff FCC No. 260 and Western Union's Tariff FCC No. 254 is a troublesome one which poses a danger of discriminatory treatment in violation of Section 202(a) of the Communications Act and of the Commission's ruling in the Telpak Sharing Case, 23 FCC2d 606, 26 FCC2d 862, affirmed in part and reversed in part sub nom. American Telephone and Telegraph Co. et al. v. Federal Communications Commission (CA2-1971). The Commission should examine the existing practice very carefully and, if it decides to permit expanded use of the concept, should require each new party desiring such treatment to seek authorization and to justify its request with a strong public interest showing.

2. As the above summary indicates, MCI believes that generally unrestricted resale and sharing are in the public interest, and that the single customer concept is basically discriminatory and should be eliminated, or at least regulated very, very closely. As long as entities wishing to resell an augmented communications service are fully regulated as common carriers under the Communications Act, and as long as safeguards are established to insure that sharing is not a disguised resale operation, further restrictions need not be imposed. Any repricing or change in volume--or even complete

curtailment--in any line of service that may come about because of this policy would simply signify a more realistic alignment of rates with costs. Adoption of this policy would be equitable toward all communications users, even toward present single customers who could become resellers or sharers under the new ground rules. In essence, MCI's position is that if the Commission establishes a general policy in favor of unrestricted resale and sharing, with only a few necessary definitional limitations and safeguards, more equitable treatment and greater access to communications will come about, and the Commission's regulatory burden will increase only minimally.

3. The scope of these reply comments is the following:

(1) an examination of the appropriate definitions of resale and sharing to show that all necessary restrictions on those concepts are within the parameters of the definitions themselves; (2) the rejection of the purported justification for present non-definitional restrictions on resale and sharing and the purported justification for the single customer concept put forth by the established carriers--principally AT&T--and others; (3) a brief discussion of the lack of wisdom of other restrictions and practices with regard to resale, sharing and single customer use suggested by various parties; and (4) a closer analysis of the regulatory problems in determining (a) what is "augmented" service for resale and (b) what exact steps should be taken to insure that sharing is not, in fact,

disguised resale.

4. Properly defined, the concepts of resale and sharing contain within their own definitions all the limitations necessary to formulate an otherwise unrestricted policy in favor of resale and sharing. Accordingly, reference to a policy in favor of "unrestricted" resale and sharing in these reply comments means "unrestricted" except for the limitations found in the definitions described below.

5. Resale is basically the purchase of a communications service or the leasing of facilities from a common carrier by an entity and the subsequent sale of such services, or the subletting of such facilities, to others. A reseller so dealing in a communications service is himself a common carrier under Section 3(h) of the Communications Act, even if he only leases the facilities. As a common carrier, the reseller is subject to regulation under Title II of the Act, and must obtain Section 214 authorization prior to operation. Most parties agree that a reseller, in order to meet the need requirement of Section 214, must intend to provide a service which is "augmented" or substantively enhanced over that provided by the primary supplier. The problems in determining what is an "augmented" service and to what extent and in what manner sellers should be regulated by the Commission is discussed below, pp. 22-24.

6. Sharing is the joint use of a communications service by two or more persons, with costs allocated among the

users on the basis of their proportionate use. If sharing is to remain bona fide, and not become resale in disguise, it must contain the following definitional limitations: (a) each sharer must have a communications need of his own that arises independently of the sharing arrangement; (b) the sharing arrangement must be operated on a not for profit basis; and (c) costs among the sharers must be allocated on the basis of proportional use of the service or facilities. The incorporation of necessary elements into the regulatory process to insure that the above limitations will be met is discussed separately below, pp. 24-26.

7. In the initial round of pleadings in this proceeding many parties, including MCI, limited their comments on the present restrictions in the tariffs of the established carriers until after those carriers had articulated their own justification for their practices. At this stage, however, MCI believes that the carriers have not provided an adequate justification for the present restrictions, except to the extent that their tariff restrictions are consistent with the restrictions contained within the above definitions of resale and sharing. Furthermore, no showing has been made that the public interest would not be better served by the removal of all nondefinitional restrictions on resale and sharing.

8. At the outset, it should be noted that one established carrier, Western Union, does not attempt a justification for the present restrictions because it is not

convinced itself that they are appropriate. Western Union sees the single customer issue, for example, as a request by the Commission for justification for the carriers' offering of price discounts to bulk users of its services. It views the bulk discounts as central to the present inquiry, since it believes that, except in the case of value-added services, resale and sharing would not have proliferated in the absence of such discounts. After noting initial reservations about the role of middlemen in the communications industry, Western Union opts for the provision of sharing and resale with only restrictions of the type found in the above definitions.^{2/}

Western Union also believes that price discounts for private line services should be prohibited, except to the extent that they do not exceed actual savings in costs of providing facilities and service on a bulk basis.

9. AT&T and GTE Service Corporation attempt to provide a general legal justification for the present restrictions on the basis that the carriers' authority to adopt tariffs is well-settled, as is their authority to impose reasonable restrictions within the tariffs. They argue that the present restrictions are reasonable, and dust off a number of electric utility and other cases in support of the argument. GTE

^{2/} The distinction between definitional and other restrictions becomes significant here. Western Union desires to restrict resale of "essential monopoly services" to the established carriers and to permit resale as long as the reseller is regulated and can demonstrate a public benefit not otherwise generally available. These conditions are but another way of stating the "augmented service" requirement contained within the definitional parameters of resale proposed above.

further submits that the burden of change is on those attacking the present tariff structure.

10. The attempt to justify the present restrictions on a "once reasonable, always reasonable" basis indicates a material misapprehension of the nature and scope of the present inquiry. This is not a proceeding to set aside individual tariff provisions, however reasonably formulated in the historical sense. Rather, it is a general rulemaking proceeding where the Commission seeks to exercise its full and expansive powers to meet cumulative needs under the Act in the light of current conditions, which have greatly changed in recent years with the introduction of new competition into limited areas of common carrier communication. As the Commission noted in Paragraph 4 of the Notice, the present inquiry involves a number of complex issues that have an impact on the basic overall structure of the industry, and it would therefore be inappropriate to consider these issues in the context of a more individualized proceeding. It is precisely in fulfillment of the Commission's regulatory mandate that it has instituted this general inquiry and rule-making proceeding, and that it has appropriately placed the burden on the established carriers to justify the status quo. The "once reasonable, always reasonable" argument, then, does not really respond to the present overall situation which gave rise to the present inquiry.

11. In terms of the specific cases cited by AT&T

and GTE in defense of present tariff restrictions on resale, none of the dangers posed and considered there would exist if the reseller were a regulated common carrier providing an augmented service. For example, the cases cited by GTE upholding restrictions on resale were aimed at the problem of a middleman who bought a monopoly service at wholesale and later sold the same basic, unenhanced service at a profit, and who was beyond the jurisdiction of the regulatory body. These cases, then, do not justify restrictions on resale--other than those contained in a proper definition of resale itself--under the circumstances of today.

12. Especially with regard to the comments of AT&T, there is a basic difficulty presented in attempting to reply to the purported justifications for the present restrictions and the forecasted effects of removing those restrictions. AT&T claims an adverse effect on the public interest if all restrictions on resale and sharing were removed, but does not follow the Commission's items of inquiry by addressing separately the removal of restrictions on resale and the restrictions on sharing. AT&T's response is obfuscated not only by the aggregation of the concepts of resale and sharing, but also by the assumption that "unlimited" resale and sharing do not even include the restrictions inherent in the basic definitions of resale and sharing. This overall analytical premise, besides being unresponsive to the separate items of inquiry and the expectations of the other participants,

renders AT&T's purported justifications suspect from the beginning. It is obviously designed to maximize the claimed impact of modifying policies and practices as to resale and sharing in an effort to discourage any change in the present arrangements. This renders the resulting "study" figures totally useless because they are based on wholly unrealistic assumptions as to what the Commission is likely to do.

13. AT&T's basic argument is that "unlimited resale and sharing" would require a repricing of Telpak which would destroy its attractiveness as a competitive response to private microwave. This shift would also require a repricing of WATS, and place a greater burden on the message telephone service. AT&T claims that a proliferation of sharing and resale options would aggravate the busy-route, sparse-route dichotomy, necessitate more high-low tariffs, and further destroy nationwide rate averaging. The estimated overall decrease in revenues, plus increase in costs from "unlimited resale and sharing" over a one-year period, is claimed to be \$178 million, which AT&T asserts would have to be made up in increased rates.

14. The emphasis in the AT&T comments on the effects of opening up resale and sharing options is on the following two points: (1) Telpak could not survive unlimited resale and sharing; and (2) substantial repricing would come about from the ensuing shifts in use. It is submitted that neither

of these results is a per se evil, and both could be beneficial to the extent that the shifts cause a more realistic alignment of rates with costs. Assuming that present rates are compensatory in the first place, necessary readjustments in pricing could not be expected to cause any significant overall rate increases, AT&T's claims to the contrary. Any increases that would come about incident to the costs of repricing itself would be far outweighed in benefit by the attendant equities in having each user pay a rate more reasonably aligned with the cost of the service.

15. AT&T's cautiously protective stance toward Telpak and the fear of its demise if greater sharing and resale are permitted, helps to confirm long-standing suspicions of many, including MCI, of the wisdom and virtue of the Telpak preferences. It also shows how deeply the basic issues concerning Telpak, yet to be satisfactorily resolved even after ten years, are lurking behind the issues of resale, sharing and single customer use in question here. Perhaps the most commendable resolution of the Telpak question would be in the playing out of AT&T's prediction of its death by the allowance of "unlimited resale and sharing".

16. As pointed out above, Western Union recognizes the tie between Telpak and the resale, sharing, and single customer issues. For Western Union, the starting point is the single customer arrangement, where the carriers provide price discounts to bulk users of its services, including

Telpak. Western Union asserts that, except in the case of the so-called value added services, resale and sharing would not have proliferated in the absence of such discounts. It states that discount pricing arrangements to bulk users, of which Telpak forms an integral part, are discriminatory and anticompetitive, but not inherently so.'

17. Datran continues the attack on bulk discounts, especially as related to Telpak. Telpak, Datran asserts, is a contrived pricing scheme designed to provide discounts to privileged users who subscribe to a multiple of non-discrete private line channels which afford no cost savings over an aggregate of individual channel offerings. Telpak is further discriminatory, according to Datran, because it has never been shown to be compensatory.

18. MCI concurs in the above views of Western Union and Datran and welcomes the demise of Telpak, whether it would come about through repricing in the marketplace or otherwise. It cannot be overemphasized that any repricing that would come about would simply signify a more realistic alignment of rates with costs, and would afford more equitable treatment toward all communications users. If this repricing would cause the elimination of Telpak, it is but an indicator that something is wrong with the cost-revenue ratio of Telpak in the first place.

19. Also, it is no answer to say that Telpak is an authorized response to private microwave because of competitive

necessity. The initial justification for the pricing arrangement does not render it eternally sacred in the marketplace, especially if its demise follows the initiation of policies by the Commission which guarantee a more equitable and reasonable access to communications in fulfillment of its broad regulatory mandate.

20. AT&T's argument that increased resale and sharing would endanger the "attractiveness" of Telpak as a competitive response to private microwave and would eventually cause its elimination is flawed in several other respects. AT&T argues that, although the initial flat Telpak rate is usage insensitive, costs are usage sensitive, depending on the fill of capacity. Greater sharing, AT&T contends, would start off meaning lower prices for the shared service because of the greater fill, and would attract a shift in usage and revenue from the message services to private line WATS and Telpak. AT&T claims that the increased fill in Telpak would bring increased costs, outrunning the increased revenues, and would necessitate repricing in the service, causing the discount rate to approach the individual channel rate. But the private line rates could only be increased, AT&T contends, if competitively possible. AT&T asserts that the increase would not be competitively possible, since that would cause a shift to the private line competitors, and would thus force AT&T to engage in even further deaveraging and other attendant evils.

21. First of all, an increase in Telpak rates does

not necessarily mean a flood of loss of business to private microwave. The original Telpak rates have been repeatedly raised with no significant shift in usage because of the increase. Besides, a loss of some service might be viewed as somewhat of a benefit for AT&T and its shareholders, who would then be relieved of some of the burden of a non-compensatory or barely compensatory service. As for the question of increased fill of capacity, causing increased costs and then shift in usage, it should be pointed out that the greatest present user of Telpak is the United States Government, and that its fill of capacity is far greater than other users. If an increase in fill would bring the discount rate more in line with actual costs, i.e., force the discount rate to approach the combined rate of individual channels, then the discrimination inherent in the present pricing system would be lessened. Most importantly, it must be remembered that a removal of present restrictions cannot bring about generalized "Telpak sharing," for that has already been declared discriminatory. A basic assumption to the removal of restrictions on Telpak, an assumption which AT&T overlooks, is that bulk discounts in the sharing of Telpak should exceed the aggregated individualized channel rates only to the extent that the shared use represents an actual savings in services and facilities.

23. The refusal of AT&T to separately address the issues of resale and sharing and the refusal to make distinctions

between basic definitional and other restrictions makes further relevant comment on its Telpak argument practically futile at this time. The problem is magnified with respect to AT&T's predicted \$178 million net revenue change in the first year due to "unlimited resale and shared use." Nevertheless, several observations must be made with respect to the faulty premises of AT&T's revenue "study."

24. The AT&T "study" talks of a negative net revenue impact that would come about because of all the shift in usage due to "unlimited resale and sharing." In its narrative analysis of the situation, it claims that much of the primary shift to Telpak would later shift away after a price increase. Yet the "study" does not take into account all the supposedly necessary repricing that would come about, but instead relies only upon 1974 rates. This alone distorts the estimate considerably, even assuming the correctness of the methodology otherwise. Another faulty assumption is that all private line users would jump to shared Telpak under discounted rates now available to only "single customers" and a few others under the present AT&T tariff structure. AT&T knows that this generalization of Telpak sharing under present bulk rates would be discriminatory and that therefore such an assumption is untenable. Also, it is questionable whether the "added costs of facilities" considered as part of the \$178 million figure are true costs or should more appropriately be considered long term capital investments. Furthermore, even

assuming the correctness of the shift analysis, it is doubtful that the "study" sufficiently takes into account the added stimulation for usage caused by increased opportunities and effective price decreases in the down phases of the shift.^{3/} Certainly, the "study" does not take into account the increased benefits to the public that would come about from any increased competition due to a change in sharing and resale options. AT&T's concern is only with shifts to specialized common carriers and others, and views as negative any diminution in its market share over what it would have had without competition. The more important consideration in the public interest, of course, is the additional benefits which accrue to the public because of competition.

25. As mentioned above, the most important reason that the AT&T "study" is totally useless is its refusal to address the distinct issues of resale and sharing separately. There is no indication of what negative effects are supposedly caused by resale alone. There is no hint as to what negative impact increased sharing alone brings. Even more distorted is the meaning attached to "unlimited resale and sharing" and its use in the basic assumption for the "study.". According to AT&T's study premises, "unlimited" resale includes middlemen

^{3/} For example, if nondefinitional restrictions on WATS sharing were eliminated, many small, bona fide groups of users could be expected to pool their requirements to purchase a WATS service that would otherwise be uneconomical in the absence of sharing. WATS sharing is discussed further below, pp. 18-19.

unscrupulously reselling unaugmented communications services and "unlimited" sharing includes arrangements wherein brokers participate in disguised resale. This is certainly not a fair reading, by any commonsense measure, of what is meant by the removal of restrictions on resale and sharing. AT&T's twisted "unlimited resale and sharing" assumption is not only unresponsive to the spirit of the Commission's inquiry but is also intimidating toward other parties in the proceeding who would like to respond to a reasonable attempt to justify the present restrictions.

26. Two examples can be cited to show how the AT&T version of "unlimited resale and sharing" distorts the study's basic assumptions. First of all, the study assumes that the business customers would be engaged in resale and sharing. The definitional restrictions on resale and sharing render this assumption invalid, because not all business customers would qualify as bona fide sharers nor would they all qualify as regulated carriers reselling an augmented communications service. Second, AT&T assumes that some business switched message service and measured time WATS traffic would be diverted to Full Business Day WATS by "middlemen" who would in turn resell the service at a profit. This massive alleged shift (\$38.8 million) would not occur if resellers were only regulated carriers engaged in providing an augmented service. Again, the fundamental definitional restrictions on resale would prohibit unregulated middlemen from brokering the basic

WATS service.

27. GTE, contrary to AT&T, at least attempts to respond to the Commission's items of inquiry seriatim, even though its justifications for present restrictions are likewise unresponsive if the fundamental definitional restrictions on resale and sharing are assumed. GTE's response to item no. 2 is that parasitic middlemen will broker unaugmented private line services. In response to item no. 4, GTE contends that MTS resale at a markup would involve price-gouging by parasitic middlemen and that resale of WATS would bring about a discriminatory rate result between single and multiple users. As to item no. 5, GTE responds that a removal of private line sharing restrictions would encourage the onslaught of entrepreneurs disguising themselves as sharers but who would be, in fact, unregulated resellers. None of the above dangers would be realized, of course, as long as there is compliance with the ground rules inherent in the notions of resale and sharing: sharing must be a bona fide, not-for-profit, proportionally cost-allocated operation, in which each sharer has a communications need of his own independently of the sharing arrangement, and resale can only involve fully regulated carriers reselling an augmented communications service.

28. Further examples of how the only justifiable restrictions on sharing and resale are those contained in the definitions themselves can be seen by reference to the carriers' responses to the items of inquiry numbered 5 and 8. In terms

of the issue of limiting sharing of private line services to voice grade and under in item no. 5, the carriers' inapplicable "once reasonable, always reasonable" legal justification attempt and AT&T's completely muddled and invalid economic justification attempt have already been discussed. Also unhelpful is the tactic of both AT&T and GTE of jumbling the first half of item no. 5 (relating to the restriction of sharing to voice grade and under) with the second half (relating to the "need of their own" definitional restriction) in a manner that precludes a meaningful response to the first half of the question alone. The only other justification proffered for limiting the sharing of private line services to voice grade and under is that of United System Service (USS) on technological grounds. USS contends that the engineering design of the telephone companies' exchange plant justifies the restriction, and that above-voice grade service requires specially constructed facilities. The answer to this contention is that the technology already exists and is in use for sharing in above-voice grade services. The costs of any "special construction" necessary to provide the service will certainly be borne in part by prospective users, but that is the rule regardless of whether above voice grade facilities are to be shared or not. In sum, no nondefinitional restriction on the sharing of private line services above voice grade has been justified.

29. The sufficiency of the definitional restrictions

on resale and sharing to deal with the needs and interests in sharing of other services (item of inquiry no. 8) is also evident. WTAS should be allowed to be shared under the basic ground rules. If three or four small businesses in the same office building, for example, wish to share a WATS line, they should be allowed to do so. No discrimination would arise between single and multiple users, since the "single" user is likely to be a large corporation, composed of many actual users, who will probably make more calls than the smaller group "multiple" user. Nor would, as GTE suggests, the Associated Students of the University of Arizona problem arise (43 FCC2d 197 (1973)), because it is unlikely that 28,000 people, each with a communications need of his own, would band together in a bona fide sharing agreement. Any attempt to band them together by an organization would also be impermissible, since the organizer could not get Commission authority to resell an unaugmented WATS service under resale norms.

30. The justifications offered for the single customer concept are likewise insufficient. It is MCI's position that these provisions are basically discriminatory and should probably be eliminated. If they are permitted to stand, the single customer concept should be regulated very closely and new exceptions should not be permitted in the absence of a compelling public interest showing. However, it is difficult to conceive of a case in which the extension of the basically discriminatory practice would not simply magnify the discrimination.

31. AT&T does not respond at all to the items of inquiry in the Notice (9 and 10) addressing the single customer practice, except to give the almost tautological response that the exceptions were instituted upon individual, exceptional showings of a need for tariff revisions. GTE, in effect, admits that the single customer concept is discriminatory, but says that the Act allows different offerings to different users, as long as the discriminations are not unreasonable. But GTE's discussion of historical reasonable discriminations does not address the question of the reasonableness of the discrimination in the single customer concept, in the light of the interest of the Commission to examine the situation as it exists today in the communications industry.

32. Aeronautical Radio, Inc. (ARINC) attempts a justification of the single customer provision which is similarly unresponsive to the broad scope of the Commission's inquiry. According to ARINC, the question of discrimination arises not in terms of how the Commission has framed it, i.e., whether the single customer practice itself is discriminatory, but only in terms of whether established carriers have discriminated against other entities who have presented meritorious requests to become a single customer. In attempting to focus the inquiry on whether refusals by carriers in individual instances are discriminatory, and not whether the institution of the status under the tariff is discriminatory, ARINC has turned item of inquiry no. 9 upside down. If the

Commission only wanted to hear the discrimination question on an individual refusal basis, it would not have consolidated Docket No. 19746 in this proceeding. That this is a general rulemaking inquiry where the question is whether the single customer practice itself is discriminatory is made clear in the Notice, Paragraphs 22-25 and in the terms of item of inquiry no. 9. ARINC's unresponsiveness to the more general inquiry is typified by its citation of a group of ICC cases. Perhaps those cases contain applicable tests with regard to discrimination on a carrier against carrier basis, but they do not limit the Commission's general inquiry and broad rule-making power to investigate the single customer practice generally.

33. The solution to the problem of discrimination in the single customer concept is not, as ARINC suggests, the formulation of guidelines by the Commission which would not change present practice, but would limit the club's membership to ARINC and others like it. American Trucking Association (ATA) and National Retail Merchants Association (NRMA) also concur in ARINC's basic approach, but would want the guidelines formulated to insure their own qualification as a single customer.

34. In summary, it is MCI's position that not only have the established carriers and others failed to justify the single customer concept and the present nondefinitional restrictions on resale and sharing, but they have commented in a manner that does not respond to the breadth of the

inquiry undertaken by the Commission. It is within the frame of reference of the nature of the entire industry, especially as it has developed in the past five years, that the justifications for the present restrictions must be given. In this regard, special reference should be made to the position of the specialized common carriers (SCC's) who, in accordance with authorization from the Commission which has been sanctioned by the courts, should be able to compete in all private line services. As Southern Pacific has pointed out, it is against the public interest to permit restrictions to be placed upon the resale by a regulated SCC of the enhanced services of the established carrier, when the SCC has been given full authority to compete in all private line services.

35. If all nondefinitional restrictions on resale and sharing are removed, the question remains to what extent and in what manner the Commission should regulate in these areas. In this respect, the comments of many parties are in substantial agreement and the Commission has been provided with realistic and responsive options.

36. With regard to resale, MCI agrees with the majority view that the Commission should establish rules that define resale as (a) the subsequent sale or leasing of communications services or facilities purchased or leased from a communications common carrier (b) by a reseller who is also regulated as a common carrier under the Act and (c) who is providing a service which is "augmented" over that provided

by the primary supplier. Further, the above definitional restrictions should be tied to the primary carrier's tariff, at least to the extent that the tariff lists as a condition precedent to resale Commission authority to do so under the above guidelines.

37. As to the extent of regulation, MCI also agrees that resellers must obtain a Section 214 certificate (which could not be obtained without the showing of a need for the proposed "augmented" service), and comply with title II provisions regarding tariffs and discrimination. As pointed out by several parties, rate base regulation would be inappropriate for reseller-carriers providing "augmented" service. One observation on regulation of resellers made by USS, however, is not persuasive. USS contends that some resellers may only be connecting carriers under 47 U.S.C. §152(b)(2), and therefore only subject to regulation under §§201-205 of the Act. It is submitted that the problem of intrastate connecting carriers does not arise here. Either the reseller will be engaged in interstate communications service for hire and thus be regulated as a common carrier under 47 U.S.C. §153(h), or will not be primarily engaged in a communications service and will not therefore be regulated. MCI believes that the Commission's present approach in determining who is and is not providing a communications service for hire, as pointed out in paragraphs 12, 27 and 28 of the Notice, is the appropriate course of action.

38. The issue of what is "augmented" service is a bit more elusive. Generally, MCI believes that the Commission should establish a broad definition of "augmented" to put potential applicants on notice of what is to be expected of resellers. Beyond that, it should then proceed on a case by case basis. No general policy in favor of the entry of resellers providing "augmented" services should be enunciated since, as the Commission points out in the Notice and other parties have emphasized, the Commission does not have before it a great number of Section 214 applications which might furnish sufficient information leading to a blanket pronouncement.

39. Any general positive definition of "augmented" is likely to be amorphous and little helpful. The variations in the comments include "substantively enhanced," "technologically advanced," "value-added," "providing a public benefit not otherwise generally available," and "providing a service not being adequately provided by existing carriers."

40. Perhaps a negative definition of "augmented" would be more useful. The Commission could make clear by rule that a reseller may not gain Section 214 certification if he is proposing only minimal marketing, management, or administrative benefits, cost savings, and the like.

41. With regard to sharing, MCI again agrees with the majority view that the Commission establish rules that define sharing similar to the definition given above, pp. 4-5.

Beyond the restrictions contained in such a definition, no further restrictions should be required.

42. As has been expressed by many parties, there is a legitimate regulatory concern in guaranteeing that sharing is disguised resale. In its comments and in its 1972 petition for rulemaking (RM-1997), MCI advocated reporting requirements and procedures similar to those found in section 93.4 of the Rules, which are reproduced in a note to paragraph 21 of the Notice. Upon consideration of the comments of various parties pointing out the additional administrative burden of regulating sharers who may not be licensees or otherwise regulated under the Act, MCI is willing to adopt a compromise position similar to the "two-wire" suggestion of Telenet in its comments, pp. 23-26.

43. As Telenet correctly points out, sharing becomes more suspect as the number of users increases and where more revenues are collected from the users than are necessary to cover the cost of the facilities. Perhaps, then, provisions of the following type could be inserted in the Commission's rules and in the tariffs of the carriers: (1) Up to a certain number of proposed users (5 or 10, or whatever the Commission determines is appropriate for the given service), the sharers should make initial and later periodic filings with the carrier of information similar to that contained in section 93.4 of the rules and pages 24-26 of the Telenet comments. The filing should be made available for public inspection by the carrier. If the number of users exceeds the prescribed limit,

then the same information should be filed with the Commission, which could place the arrangement on public notice and allow opportunity for comment or further participation before passing on the arrangements. (2) The same procedure should be followed with regard to administrative costs. If administrative costs of sharing exceed a certain percentage (5 or 10 percent, or as the Commission decides), the filing of the pertinent information concerning the arrangement must be made with the Commission as well as with the carrier.

44. Since bona fide sharing arrangements by their nature should be small, the Commission would process a minimum of sharing proposals under the above guidelines. At the same time, the above guidelines furnish a remedy for a person with reason to believe that a sharing operation, too small to be reported to the Commission, is, in fact, disguised resale. He may inspect the information filed with the carrier and, if his suspicions are confirmed, may complain to the Commission that someone is engaged in resale without the required Section 214 authorization.

45. As expressed many times throughout these reply comments, MCI believes that the purported justifications for present resale, sharing, and single customer practices provided by the established carriers have not been sufficient or responsive. Given the narrow and technical approach taken thus far by the established carriers, it is doubtful whether the next phase of pleadings will be more responsive to the

broad scope of the Commission's inquiry, under the present procedures. Therefore, MCI respectfully requests that the Commission issue a further Notice in this proceeding, asking again for justifications for the present practices, but this time seeking a response given certain assumptions. These assumptions, commonly accepted by almost all parties, are that sharing and resale contain certain restrictions within their own definitions. These are the same "definitional restrictions" that have been referred to repeatedly in these reply comments. If the established carriers adequately respond within the confines of those basic assumptions, then MCI believes that the Commission will be much closer to a just and determinative resolution in this proceeding.

46. In conclusion, we hope that these reply comments will be helpful to the Commission in resolving the basic and critically important issues involved in this proceeding. We repeat our regret that these comments are not as ample as would have been the case within a larger time frame, and we renew our willingness to supplement these reply comments if the Commission so desires. In any event, we look forward

to amplifying our views in the later stages of this proceeding.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION
MCI-NEW YORK WEST, INC.
INTERDATA COMMUNICATIONS, INC.
MICROWAVE COMMUNICATIONS, INC.

February 24, 1975

1062

DUPLICATE

FILE

JCB

UNITED TELECOMMUNICATIONS, INC.
Suite 1102, 1800 K Street NW, Washington, D.C. 20006-202 659-4600

CAROLYN C. HILL
SENIOR ATTORNEY

RECEIVED

FEB 24 1975

February 24, 1975 F. C. C.
VICE OF THE SECRETARY

Mr. Vincent J. Mullins
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554

Dear Mr. Mullins:

In the Matter of Regulatory Policies Concerning
Resale and Shared Use of Common Services and
Facilities, Docket 20097

Enclosed for filing by United System Service, Inc., on behalf of
the member companies of the United Telephone System is an original and
fourteen (14) copies of its "Reply Comments" in Docket 20097.

Sincerely,

Carolyn C. Hill

Carolyn C. Hill

CCH:rsd

Enclosures

1063

DUPLICATE

FILE

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEB 24 1975

F. C. C.

OFFICE OF THE SECRETARY

In the Matter of)

Regulatory Policies Concerning)

Resale and Shared Use of Common)

Services and Facilities)

Docket 20097 ✓

RM - 1997

RM - 2218

REPLY COMMENTS OF UNITED SYSTEM SERVICE, INC. ON
BEHALF OF MEMBER COMPANIES OF THE UNITED TELEPHONE SYSTEM

Pursuant to the Commission's "Notice of Inquiry and Proposed Rule Making" released July 5, 1974, in the captioned Docket, United System Service, Inc. (hereinafter referred to as "United") on behalf of the member companies of the United Telephone System* by its attorneys respectfully submits its Reply Comments.

PRELIMINARY STATEMENT

After analysis of the initial Comments filed in this proceeding, it is apparent that the majority of the parties are in agreement that resale of common carrier services and facilities requires Section 214 authority and that the wholesale removal of resale restrictions in existing tariffs would not be in the public interest. As to the tariff classifications of "joint user", "authorized user", and "single customer", the majority of the parties again do not support the wholesale removal of existing restrictions. Certain parties, however, do seek more liberal tariff provisions to enable them or others similarly situated to "share." Basically, what this involves is a question of fact as to the lawfulness

* A complete listing of member companies of the United Telephone System is set forth in United's "Comments".

of existing tariff provisions rather than resolution through the adoption of broad policy. The common carrier status of other entities, such as the facsimile groups, also has been discussed in some of the Comments. Again, this raises a question involving an issue of fact rather than calling for the adopting of broad policy in that the technical nature of these and other proposals must be known and assessed on a case-by-case basis before a determination can be made as to an entity's common carrier or non-carrier status.

Hereinafter, United has limited its Reply to a discussion of the two fundamental issues in this proceeding; namely, (a) resale, and (b) the tariff classifications of "joint user", "authorized user", and "single customer."

RESALE

1. The Commission in this proceeding has sought to consider policy with regard to, among other things, the resale of all common carrier services and facilities and to determine the role of the middleman in the provision of communications services to the public. In responding to the items of inquiry in this proceeding, United, in its "Comments," defined resale as the "purchase of communication services, or the lease of facilities from a communications common carrier by a person and the subsequent sale of such services or the subletting of such facilities to other persons." It was, and continues to be, our view that any person engaged in such resale is a communications common carrier for hire, subject to the FCC's jurisdiction, and must have Section 214 authority before providing any services.

2. To further delineate our views herein with regard to resale, it is necessary to distinguish between the type of resale proposed by some of the value added carriers and the type of resale which involves arbitrage. Under the value added carrier form of resale, entities lease facilities from existing common carriers and through the application of technology actually provide the public with a new or different service from that the public can obtain from existing carriers. Under the arbitrage type or form of resale, a middleman or broker with little or no investment leases facilities from existing common carriers and provides his subscribers with a service no different from that obtainable from existing carriers except to the extent that the subscriber may realize a lower rate for the service.

3. Both of these forms or types of resale constitute a common carrier undertaking for the reason that (1) there is holding out to the public; (2) compensation is received for the service; (3) and the customer has control over what intelligence is transmitted. Frontier Broadcasting v. Collier, 24 FCC 251, 254 (1958).

4. The question then, as we view it, is not whether the Commission should regulate resale of common carrier services in light of its mandate under the Act to regulate interstate and foreign communications services unless otherwise exempted therefrom, but, rather, which form or type of resale should be authorized by the Commission as being in the public interest.

5. Regarding the arbitrage situation, various state commission decisions, among others, have upheld telephone company restrictions on the resale of services on the basis that:

- (1) it would establish a third party between the telephone company and users of its service.
- (2) the middleman would use only such equipment as he considered necessary.
- (3) all of the company's dealing with the real users of its service would be through the medium of a third party over which the company would have no control, since, presumably the middleman would not be considered a utility.
- (4) many difficulties would be thrown in the way of providing efficient service from the telephone company standpoint as well as from the standpoint of regulation, and service complaints would multiply with little chance of timely correction, Gelsam Realty Co., v. New York Telephone Co., P.U.R. 1929, A. 224, 226 (1928). See also the Supreme Court's holding in Ambassador, Inc. v. United States 325 U. S. 217 (1945) and 1015 Chestnut Street Corp. v. Bell Telephone Co. of Pennsylvania 10 Pa. P.S.C. 492 (1930).

6. United submits that there is no basis herein for formulating policy to permit the arbitrage form of resale. As previously noted in our Comments, it is one thing to develop a new or different service through the application of technology, but it is quite another to permit rate discounts to existing services when no technological or other reasons exist to justify such discounts. Our

reading of other parties' Comments indicates that we are not alone in this belief -- see, for example, the Comments of Datran, RCA Globcom, MCI, Telenet, American Trucking Association, Southern Pacific, AT&T, GT&E, and Western Union.

7. While, as we have previously stated, both the value added form of resale and the arbitrage form of resale constitute a common carrier undertaking subject to the FCC's jurisdiction, we are not opposed to the value added proposal if the public is able to obtain new services not now available from existing carriers. With regard to those presently certificated value added carriers, the Commission has had an opportunity to determine, on an individual basis, that the proposed undertaking would, in fact, serve the public convenience and necessity. The proposals of other value added entities should be subject to similar scrutiny on a case-by-case basis, and if it can be shown that the value added entrant will offer a service not being offered by existing carriers and that a demand has been shown to exist for the proposed new service, then that applicant can be granted 214 authority. However, we are opposed to the wholesale removal of resale restrictions. Such removal of these restrictions would permit arbitrage which would have a deleterious effect on United as well as the entire telecommunications industry. Thus, the economic impacts with which we are concerned in this proceeding derive not from the introduction of new and innovative services through the application of technology, but from the wholesale elimination of tariff restrictions on resale of private line services.

8. Despite the fact that the Commission has deemed it "inappropriate" to consider the question of availability of services for resale and shared use and the regulation thereof within the context of some particular item because of its mandate "... to make available to all people ... rapid, efficient ... communications services ...", we submit that the complexity and far-reaching economic consequences of this proceeding militate against adopting a policy herein which would permit widespread resale of common carrier services and facilities. Moreover, the Commission's mandate to make available to all people of the United States rapid and efficient communications services also requires that these services be provided at reasonable charges. AT&T's estimate of the cost and revenue effect of wholesale removal of resale and sharing restrictions indicated that on a conservative basis unlimited resale and sharing of communication services would result in a loss of net revenue in excess of 178 million dollars annually (AT&T Comments, p. 33). Such estimated effect encompasses only AT&T, however the Independent telephone industry would be similarly affected.

9. In light of the aforesaid, United is of the view that it would not be in the public interest nor consonant with the Commission's stated mandate to adopt policy permitting wholesale removal of resale restrictions. Instead, the Commission should adhere to a Section 214 approach with regard to those entities desiring to provide a new or different service to the public.

TARIFF CLASSIFICATIONS "JOINT USER," "AUTHORIZED USER," AND "SINGLE CUSTOMER"

10. The terms "joint user," "authorized user," and "single customer" are tariff classifications and nothing more. For the purposes of this inquiry, these terms are synonymous with "sharing." As we have defined "sharing" in our Comments, it is "the cooperative use of communication service by more than one person and where the costs of such service are allocated, on some basis, to the person using such services." As a tariff classification sharing is thus subject to the prohibitions against unjust and unreasonable discrimination as provided in Sections 201 (b) and 202 (a) of the Act.

11. To summarize briefly our views with respect to the adoption of policy extending the sharing of private line and other services offered by existing carriers, United believes:

- (1) services such as WATS and MTS are not those designed to permit the sophisticated, augmented non-voice services for which the Commission apparently believes there is a demonstrable, rapidly growing market.
- (2) basically the current tariff restrictions limiting the sharing of private line services to voice grade and under is based on the engineering design of the exchange plant of the telephone companies which is designed, generally, to provide basic voice grade services.
- (3) the alleged public need for augmented non-voice communications services cannot be met by permitting the carte blanche sharing of all private line, MTS, and WATS services

due to the engineering and plant required for these services.

- (4) economically unrestricted sharing could have an adverse impact upon a common carrier's local exchange subscribers due to the cross elasticity between private line services and MTS.
- (5) the adoption of policy relative to sharing would run counter to the public interest if the economic consequences were not thoroughly assessed before any policy is promulgated.
- (6) to eliminate an after-the-fact approach, before any policy is adopted regarding extension of sharing, data should be obtained as to the effect on subscriber rates and Independent company settlements as well as the existing customer demand.

12. As recognized by various parties, such as Telenet, MCI, RCA Globcom, Southern Pacific, GT&E, Datran, ARINC, The Association of American Railroads, Western Union, and the Commodity News Services, Inc., the elimination of all tariff restrictions would result in sharing being nothing more than a subterfuge for resale. Without some form of restrictions on sharing, entities would be permitted to engage in a resale activity as a common carrier but would not be subject to the required FCC regulatory controls. In order to ensure that a customer sharing his communication services and facilities with others does not engage in resale, United and other parties believe that the necessary distinction between resale and sharing can only be maintained by at least requiring that each

person have a bone fide communications need of his own as well as pay no more than the allocated cost of his service. (See, for example, the Comments of Datran, Telenet, the American Association of Railroads, Western Union, ARINC, and Southern Pacific).

13. While basically it is not disputed in the different Comments that the wholesale elimination of sharing restrictions would not be in the public interest, some parties do advocate the extension of certain tariff classifications. The National Retail Merchants Association and the American Trucking Association, for example, would like to receive single customer treatment while others, such as the American Association of Railroads and the Utilities Telecommunications Council, believe that "sharing" should be extended to include at least all rate regulated entities.

14. As heretofore noted, for the reasons set forth in paragraph 11, supra, United is opposed to the wholesale elimination of existing tariff restrictions on sharing. Since the tariff classifications in question are subject to the justness and reasonableness provisions of Sections 201 (b) and 202 (a), it is our belief that if, as a result of this proceeding, the Commission believes that the carriers have not made a prima facie showing that their tariff classifications are just and reasonable, the Commission can, under Section 205 (a) of the Act, after an opportunity for hearing, prescribe what classifications, regulations, or practices will be just, fair, and reasonable.

CONCLUSION

1072

For all the foregoing reasons, United urges the Commission to consider the recommendations herein before promulgating any policy regarding wholesale elimination of resale and sharing provisions.

Respectfully submitted,

UNITED SYSTEM SERVICE, INC.

February 24, 1975

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Mr. Vincent J. Mullins
Secretary
Federal Communications Commission
Washington, D. C. 20554

Re: FCC Docket No. 20097

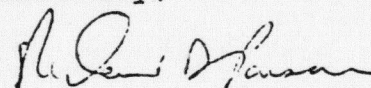
Dear Mr. Mullins:

Having studied the pleadings submitted in the above-referenced proceeding, The International Business Machines Corporation has decided not to file any comments at this time.

IBM requests, however, that it be maintained on the service list for all future Commission actions and for all pleadings of other parties in this docket.

If there are any questions concerning the above, please contact the undersigned directly.

Sincerely,



Richard D. Paisner

Served by mail, postage prepaid, on parties to
FCC Docket No. 20097.

RECEIVED

FEB 24 1975

F. C. C.
OFFICE OF THE SECRETARY

REPLY COMMENTS
OF THE
NATIONAL RETAIL MERCHANTS ASSOCIATION, INC.

COMES NOW the National Retail Merchants Association, sometimes hereinafter referred to as "NRMA", by its attorney, and respectfully submits its Reply Comments in this proceeding. NRMA originally submitted comments in this proceeding on December 11, 1974 and is submitting these Reply Comments on February 24, 1975, the date set by the Commission.

I.
Preliminary Statement

1. In its original comments NRMA argued against the present unlawful restrictions and discrimination which derive from the presently effective "single customer concept". Section 2.2.1., Tariff FCC 260. As an alternative, NRMA proposed the commissioning of regulated profit-oriented communications "freight forwarders" and unregulated non-profit communications user "shipper associations", both by analogy to the transportation field. We have reviewed

the comments of other parties who have endorsed a continuation of the present single customer subsidy for the airlines and who also wish to selectively expand this favored industry subsidy to "the trucking industry", the railroads, and the busses. NRMA has become increasingly concerned that the retail industry and other industries which would be excluded from the bulk rate purchasing advantages afforded by the single customer concept will be called upon to subsidize still further in terms of total revenue requirements the offerings of the communications common carriers. We are opposed to this and see no legitimate basis for the Commission confirming a "single customer concept" on a favored industry or favored industries basis.

II.
Specific Reply Comments

2. As regards the "single customer concept" and Question 9, NRMA wishes to emphasize and make most emphatic its view that the existence of this concept is in issue in this proceeding not only as regards a selective industry or across-the-board to all industries expansion, but in and of itself as it currently applies to the airlines. It is sheer pretense for ARINC to assume in its comments that the single customer concept as it benefits the airlines is not directly and currently in issue. The issue of expansion or broadening of the concept cannot be reached

until the concept itself is first validated for the airlines in a contemporary context. The tariff language which went into effect a few years ago during the Telpak Sharing litigation has never been litigated and was merely allowed to go into effect by the Federal Communications Commission. That this has been the case until the institution of the instant proceeding is a rather critical commentary on the Commission's failure to set the tariff language for prompt hearing on its own motion at the time it was filed by AT&T. There simply is no contemporary decision of the Federal Communications Commission which can be pointed to as justifying, after appropriate examination and hearings, the single customer discount rates which the communications common carriers offer to the nation's airlines.^{1/} Telpak did not exist in 1937. Thus, it would be disastrous for the Commission to accept ARINC's restatement of Question 9 and fail to examine the validity of the single customer concept for the first time as it is now applied to the airlines before considering any non-discriminatory, industrywide expansion of this bulk rate purchasing provision.

^{1/} The bulk rate Telpak issue arose when the tariff language in Section 2.2.1 was inserted in Tariff FCC No. 260 as a fallback posture for the airlines that were then anticipating the demise of Telpak Sharing in Docket No. 17457. Both Telpak Sharing and the fallback single customer provision raised and created the subsidy issue. Aeronautical Radio, Inc. v. AT&T, 4 F.C.C. 155 (1937) did not.

3. We can see that the issue of expansion on a non-discriminatory basis is complex. However, the type of selective expansion advocated by certain parties in this proceeding in their original comments is fraught with latent difficulties as well as with the potential for compounding the very questionable discrimination that already exists. For purposes of illustrating some of these latent difficulties, we will focus on the Comments of "the trucking industry" as advanced by the American Trucking Associations, Inc. First, by way of general background, we refer to an official publication of the American Trucking Associations, Inc. entitled, American Trucking Trends, 1974, also referenced in certain limited respects in the ATA Comments. Under a heading of "Structure of the Industry", ATA officially defines "the trucking industry" in terms of motor carriers as falling into two broad categories, namely, private and for-hire. Regulated for-hire carriers are subclassified into common and contract carriers and are regulated at the state and Federal levels. Private carriers are not. "Private carriers are those shippers, manufacturers, merchants, and others who use their own vehicles or lease trucks under their own direct control for moving their own goods. Their principal business activity, of course, is other than transportation." Exhibit A is the full text of page two, describing "the trucking industry", of the American Trucking Trends, 1974.

4. Exhibit B which is attached is a reproduction of page seven of American Trucking Trends, 1974 covering the distribution of trucks by type of vehicle and use. It is very important for the Commission to note the statistical breakdown in terms of trucks utilization as between private and for-hire carriers. As of 1973, there were 22,095,800 trucks of all kinds in use in the United States. Significantly, some 21,234,100 were used by private carriers. No definition of "the trucking industry" would be complete unless the vehicles used by private carriers are included. As a practical matter, private carriage is conducted by almost every non-transportation business or corporation of any significance in the United States. Ironically, as is herein noted, thousands of retailers, many of whom are members of NRMA, are private carriers and use private lines very extensively both in their overall retail operations and in connection with their private carriage operations. These uses are fungible. As a matter of fact, one of the largest private carriers in the United States in terms of fleet size is the Bell System itself.

5. All of these private carriers make up the predominate portion of "the trucking industry". Even in a breakdown by vehicle capacity, it will be noted in Exhibit B that there are more private vehicles in use than there are for-hire vehicles. Translating this into ton miles, we also note the very substantial contribution to freight

transportation by private carriers. The ton mile is a physical measurement of transportation developed by multiplying the average tons transported times the number of miles. See Exhibits C and D. Note in particular the distribution of ton miles between Class 1, 2 and 3 motor carriers on the one hand and other carriers including private carriers on the other hand.^{2/} What these statistics, all excerpts from American Trucking Trends, 1974, demonstrate is that "the trucking industry", alleged to be competitive with the airlines, comprehends in very if not most substantial measure unregulated private carriers.

6. If, indeed, "the trucking industry" as product-oriented is to be regarded, as the comments of the American Trucking Associations, Inc. would have it, as competitive in the land transportation area with the passenger-oriented airlines, then a very substantial question, if not a dilemma, arises as to why ATA, in speaking for "the trucking industry" has excluded private carriers in arguing for selective expansion of the single customer concept. Whatever ATA's

^{2/} Commonly "the trucking industry" is not thought to be significantly competitive with the airlines. Products hauling is the essence of truck transportation. People hauling is the essence of airline transportation. Air freight is incidental. "The trucking industry" is internally competitive among and between motor common carriers, contract carriers and private carriers. It is externally competitive with the railroads and to a lesser extent with water transportation and pipeline transportation. See Exhibit D, page 9, American Trucking Trends, 1974.

predicate for claiming that "the trucking industry" is a competing transportation mode with the airlines as far as freight transportation is concerned, that predicate surely is severely compromised by the exclusion of private motor carriers. We have a dilemma. If these private carriers are included as part of the definition of "the trucking industry", which indeed they should be by every statistical measure, then the very "selective" expansion of the single customer concept sought by ATA becomes anything but selective because private carriers reflect all American industries. The favored industry implementation dissolves. Stated otherwise it seems to NRMA that the ATA selective expansion argument for "the trucking industry" stands or falls essentially on a discrimination argument vis a vis the airlines. And yet, assuming "the trucking industry" inclusive of private carriers is competitive with the airlines as an alternative transportation mode for the movement of freight, then the reality of the desired selective expansion of the single customer concept would comprehend virtually all industries, including the retail industry, which has very extensive private carriage operations.

7. To make a distinction between private and for-hire, the former being unregulated and the latter

being regulated motor carriage 3/, in terms of a selective expansion of the single customer concept, would compound an already existing discrimination favoring the airlines by created a new one internally distinguishing between the private and for-hire motor carrier segments of "the trucking industry". And yet the ATA Comments appear to argue just for such an internal industry discrimination with ATA itself as a nominee for single customer status. Having spoken about "the trucking industry" in its most general terms throughout most of its comments, ATA, nevertheless, when it comes to specific tariff modification language, would restrict expansion of the single customer concept for that portion of the trucking industry which must "first obtain a governmental permit as a condition of engaging in the transportation business."

8. Interestingly, the ATA comments suggest that this would permit the American Trucking Associations, Inc. itself to be the nominee of single customer status.4/

3/ The Commission should note that there is a very substantial movement sponsored by the Administration including the Department of Justice and the Department of Transportation to "deregulate" the trucking industry, thus potentially emasculating further any distinction between private and for-hire motor transportation.

4/ Such an approach could give rise to serious antitrust issues. Generally, trade associations cannot discriminate in the services they offer to their membership. In this case, ATA membership indirectly includes both regulated and private carriers.

The American Trucking Associations, Inc. direct membership is comprised of numerous state trucking associations. ATA membership does not on any direct basis involve operating common or contract carriers themselves. These carriers are members of the state trucking associations which are in turn members of ATA. Significantly, however, many private carriers also belong to state trucking associations and they, too, as are common and contract carriers, indirect members of ATA. On a direct basis, private, common, and contract carriers are also members of various national Conferences, separate corporate organizations that are merely affiliated with ATA for specific, broad trucking industry purposes, such as the Common Carrier Conference--Regular Route, the Common Carrier Conference--Irregular Route, the Contract Carrier Conference, and, of course, the Private Carrier Conference, all of the American Trucking Associations, Inc. Many retailers are members of the Private Carrier Conference.^{5/}

9. It is apparent, therefore, that ATA (1) no longer wants the regulated for-hire trucking industry to continue subsidizing in terms of revenue requirements the unique advantages accruing to the airlines through the single customer concept; (2) would "selectively" expand the single customer concept to the regulated portion of the trucking industry (by many measures the smallest portion

^{5/} These Conferences are not parties to this proceeding.

2004261

- 10 -

of the industry); (3) would have then both the airlines and the regulated trucking industry subsidized by the private carriage portion of the trucking industry; and (4) would also have industry in general, not so favored, subsidize the airlines, the regulated trucking industry, and other regulated land transportation carriers.

10. This is the morass that awaits the Federal Communications Commission. As we said in our original comments, the Federal Communications Commission is not constituted, is not capable of, and is not equipped to place societal-economic values or priorities on different non-communications common carrier American industries. It should declare that one user industry's communications expense should not be subsidized by another. To do so does fundamental violence to the regulatory scheme in Title I and in Title II of the Communications Act of 1934, as amended. The Federal Communications Commission should on a threshold and initial basis consider for the first time the lawfulness of the single customer bulk rate purchasing advantage in and of itself as it presently relates to the airlines. Assuming the single customer concept has some applicability, the Federal Communications Commission should repudiate any industry to industry distinctions with respect to favored or disfavored industries.

- 11 -

WHEREFORE, THE PREMISES CONSIDERED, the National
Retail Merchants Association respectfully submits these
Reply Comments.

Respectfully submitted,

NATIONAL RETAIL MERCHANTS ASSOCIATION

Dated: February 24, 1975

Structure of the Industry

Motor carriers normally engage predominantly in either local or intercity operations.

As a generally accepted rule, a carrier is a local carrier if at least half his business is conducted in metropolitan or commercial zone operations.

Intercity carriers—also known as line-haul or over-the-road carriers—in almost all cases conduct local pick-up and delivery operations.

Motor carriers also fall into two other broad categories—"private" and "for-hire."

Private carriers are those shippers, manufacturers, merchants, and others who use their own vehicles or leased trucks under their direct control for moving their own goods. Their principal business activity, of course, is other than transportation.

For-hire carriers are those trucking companies providing transportation of freight owned by another party. For-hire operations are of several types: interstate, intrastate, or local. Carriers in the latter two categories are usually under public service regulation by local or state authorities. Most intercity trucking, and even some local operations, will involve interstate commerce, and thus usually come under federal regulation by the Interstate Commerce Commission.

There are three distinct types of for-hire carriers: common carriers, contract carriers, and exempt carriers.

Interstate common and contract carriers are regulated by the Interstate Commerce Commission.

Hence, they are often referred to as "regulated carriers." The ICC approves rates, routes, types of service, and types of commodities transported, as well as various other standards. The United States Department of Transportation sets safety and equipment standards, as well as hours of service regulations for employees.

Common carriers are available to the general public to transport, at published rates, a given type of freight between points which they have authority to serve. Such rights may be for regular route service—over designated highways on a regular basis—or irregular route service—between designated points or areas on a non-scheduled operation.

Every interstate common carrier, in order to operate, must prove to the ICC the need for its specific services and that the proposed service is consistent with the public interest. In its consideration of an application for such a certificate of public convenience and necessity, the ICC looks to relevant factors, such as number of shippers, their needs, nature of the service, and the effect on existing services.

Contract carriers operate under continuing contracts with one or more shippers. By assigning vehicles to the shippers and through other special services, a contract carrier renders a service designed to meet the distinct needs of an individual customer. A contract carrier also must secure a permit from the ICC.

Interstate common and contract carriers may be either general freight carriers or specialized carriers.

General freight carriers may haul a wide variety of packaged goods, usually called general commodities, but their rights customarily exclude certain freight, such as bulk commodities, household goods, heavy and dangerous materials, or other articles requiring special handling or special equipment. These and other types of freight usually are handled by specialized carriers.

Exempt carriers are those in stipulated types of commodity or operations, such as trucks used exclusively for transporting unmanufactured agricultural commodities, newspapers, etc., and vehicles used incidental to air transport and certain other limited uses.

Interstate exempt carriers are not subject to economic regulation by the ICC, but are subject to the Department of Transportation safety, equipment, and hours of service rules, as are private carriers.

2007-44

Distribution of Trucks By Type of
Vehicle and Use—1973¹

Trucks & Combinations	Private		For-Hire		Total	
	Number	Per- cent of Total	Number	Per- cent of Total	Number	Per- cent of Total
Single Unit Trucks—						
2 axles	20,143,300	94.9	339,500	39.4	20,482,800	92.7
3 axles	534,900	2.5	39,600	4.6	574,500	2.6
All Single Unit Trucks	20,678,200	97.4	379,100	44.0	21,057,300	95.3
Combinations—						
3 axles	91,800	0.4	62,900	7.3	154,700	0.7
4 axles	178,300	0.8	131,000	15.2	309,300	1.4
5 or more axles	285,800	1.4	283,700	33.5	574,500	2.6
All Combinations	555,900	2.6	482,600	56.0	1,038,500	4.7
Total	21,234,100	100.0	861,700	100.0	22,095,800	100.0

¹ Of the 21,234,100 private trucks, about 3,000,000 are farm trucks.

SOURCE: Based on vehicle distribution, *Truck Inventory and Use Survey, 1972 Census of Transportation*, U.S. Department of Commerce, Bureau of Census, with adjustments to include pick-up and panel trucks.

EXHIBIT B

1086

20077-41-

Ton-Miles

Constant increases have been achieved by the trucking industry in ton-miles of cargo transported.

The ton-mile is a physical measurement of transportation developed by multiplying the average tons transported times the number of miles. Thus, one ton moved 100 miles equals 100 ton-miles, as does 100 tons moved one mile. Obviously, the value of transportation services cannot be accurately ascertained utilizing this measure alone since, in fact, it ignores the value of the goods, the cost of moving the goods, and the value of the service.

The trucking industry in 1973 matched the annual growth rate set by all modes of transportation in ton-miles, shown in respective increases of 7.45 percent and 7.98 percent. Total truck ton-miles rose to 505 billion, which is 35 billion more than in 1972. The ICC regulated Class I, II, and III motor carriers moved 212 billion, or 42 percent of the total ton-miles moved by truck, compared with 104 billion or 37 percent in 1960.

Intercity Ton-Miles

(the ton-mile represents one ton of cargo transported one mile) distribution by type of motor carrier in millions and index by type of motor carrier (1967 = 100)

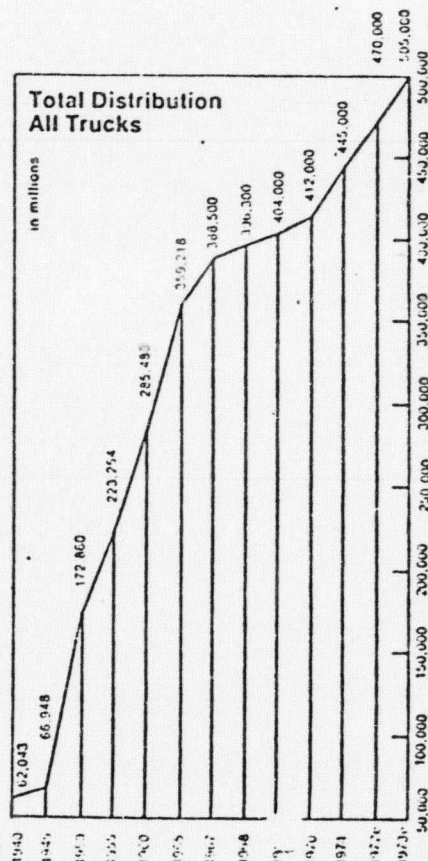
	Class I, II and III Motor Carriers ¹		Other Carriers ²		Total, All Trucks	
	Distribution	Index	Distribution	Index	Distribution	Index
1940	20,683	14	41,360	17	62,043	16
1945	27,289	18	39,659	17	66,948	17
1950	65,648	43	107,212	45	172,860	44
1955	82,906	55	140,348	59	223,254	57
1960	104,355	69	181,128	76	285,483	73
1965	140,311	93	218,907	92	359,218	92
1967	151,515	100	236,985	100	388,500	100
1968	155,400	103	240,500	102	396,000	102
1969	167,000	111	237,000	100	404,000	104
1970	170,000	112	242,000	102	412,000	106
1971	185,000	122	260,000	110	445,000	115
1972 e	195,000	131	272,000	115	470,000	121
1973 e	212,000	140	293,000	124	505,000	130

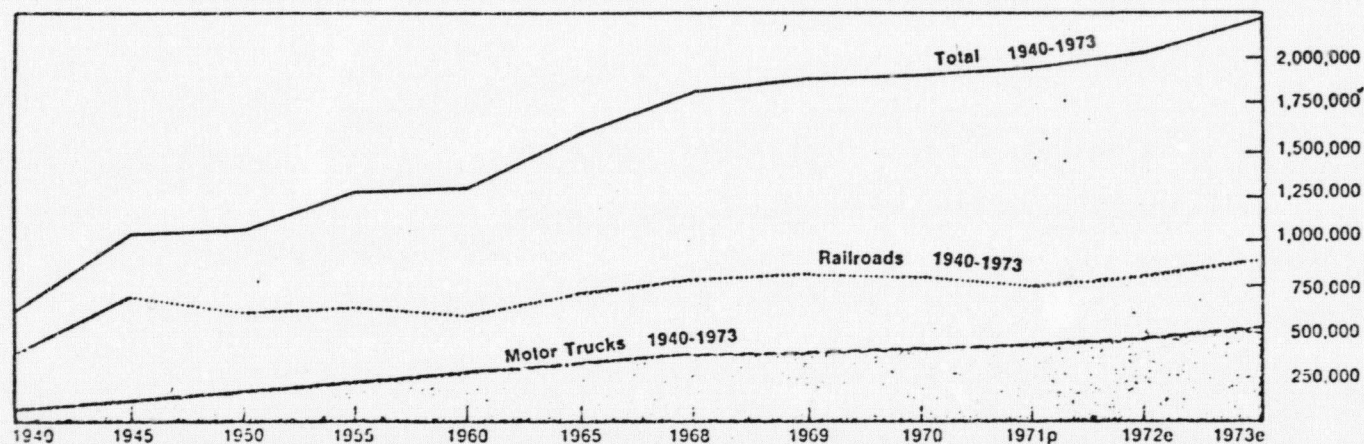
¹ Intercity ton-miles of class I, II and III intercity common and contract motor carriers of property operating under Interstate Commerce Commission authority.

² Includes intercity ton-miles of all private trucks and for-hire trucks not subject to economic regulation by the ICC, as well as intercity ton-miles of local ICC carriers.

e—Estimated, ICC and ATA Research

SOURCE: Distribution: Interstate Commerce Commission; Index: ATA Research—based on Trends Intercity Ton-Miles table.





Ton-Mile Distribution Among
Intercity Freight Carriers
for-hire and private traffic

Year	Railroads		Motor Trucks		Inland Waterways		Pipelines (oil)		Airways		Total Millions of ton-miles
	Millions of ton-miles ¹	% of total	Millions of ton-miles	% of total	Millions of ton-miles ²	% of total	Millions of ton-miles	% of total	Millions of ton-miles ³	% of total	
1940	379,201	61.30	62,043	10.03	118,057	19.08	59,277	9.58	14	.00	618,592
1945	690,803	67.26	66,948	6.52	142,737	13.90	126,530	12.32	91	.01	1,027,115
1950	596,940	55.17	172,800	16.27	163,344	15.37	129,175	12.16	331	.03	1,062,650
1955	631,305	48.53	223,254	17.51	216,508	16.98	203,244	15.94	465	.04	1,274,856
1960	579,130	44.05	285,483	21.72	220,253	16.76	228,626	17.39	891	.07	1,314,383
1965	708,700	43.25	359,218	21.92	262,421	16.01	305,393	18.70	1,911	.12	1,638,643
1969	756,600	41.16	395,300	21.55	291,409	15.85	391,300	21.28	2,916	.16	1,838,725
1969	780,000	41.02	404,000	21.25	302,901	15.93	411,000	21.61	3,574	.19	1,901,475
1970	771,012	39.83	412,000	21.28	318,560	16.45	431,000	22.26	3,295	.17	1,935,867
1971 p	746,000	38.11	445,000	22.73	315,030	16.09	448,000	22.69	3,500	.18	1,957,530
1972 e	781,000	38.05	470,000	22.90	330,000	16.08	466,000	22.80	3,800	.19	2,052,800
1973 e	850,000	38.80	505,000	22.78	340,500	15.36	507,000	22.87	4,200	.19	2,216,700

¹ Includes express and mail until 1970.

² Including Great Lakes, but excluding deep sea ton-miles between mainland and Alaska, Hawaii and territories.

³ Domestic revenue service, including express, mail and excess baggage. Intra-Alaska and intra-Hawaii ton-miles included beginning in 1959. Effective January 1, 1970, operations between the 48 states and Alaska/Hawaii were reclassified as domestic operations. Data for the years after 1969 has been adjusted in accordance with the new definition.

p — Preliminary e — Estimated, ATA Research

SOURCE: Interstate Commerce Commission, U.S. Corps of Engineers, Association of American Railroads, Civil Aeronautics Board.

EXHIBIT D

1088

20097-47

OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C. 20504

1689
DUPLICATE
FILE
JCB

February 25, 1975

DEPUTY DIRECTOR

Honorable Richard Wiley
Chairman
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Dear Dick:

The Commission's inquiry in Docket No. 20097 regarding resale and shared use of common carrier services and facilities poses two important challenges for the Commission. First, it presents a unique opportunity to enable more efficient and innovative utilization of common carrier facilities by the removal of the present tariff restrictions and, second, it challenges the Commission to demonstrate that the regulatory process can be used creatively to enhance consumer choice and reduce costs at a time when regulatory action in general is coming under close scrutiny and examination.

The Office of Telecommunications Policy has, on several occasions, commented on the advantages of liberalized resale of common carrier transmission capacity. In our letters of May, 1973 and June, 1974 regarding the Bell System's DATAPHONE Digital Service, we urged authorization under conditions that would permit resale of this basic transmission capability through the addition of hardware or software to provide customized digital services. In our letter of January 24, 1974 concerning the authorization of certain value-added services, we stated that we regard the emergence of "brokers" and other intermediaries in the communications field as an important means of meeting unique and specialized communications requirements. The Commission itself has noted that the middleman has made important contributions to nearly all aspects of commerce throughout our Nation's history, and we believe it is in the public interest to open the way for similar contributions in communications services.

We have continued the studies to which we referred in our January 24 letter and have now had an opportunity to review the various filings submitted to the Commission in the first round of these proceedings. The enclosed Comments summarize our findings and recommendations, and I would be pleased to have them placed on public record for comment in the third round.

20097-72

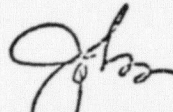
Basically, we find that to the extent present tariff restrictions prohibit or severely limit resale or shared use--more generically, brokerage--of common carrier circuits, significant public benefits are denied. In our judgment, removal of these restrictions would promote the development of innovative and diversified communications services closely tailored to the needs of individual users and would tend to equalize communications costs as between large and small users. Moreover, it would promote the more efficient utilization of common carrier facilities and help to eliminate price inequities within common carrier tariff structures. A detailed discussion of these and other benefits that would result from a liberalized resale policy is set forth in our enclosed Comments.

The second challenge that is posed by this proceeding is the opportunity to demonstrate that the regulatory process remains innovative in serving the interests of the rate-paying public. Although the Commission as well as several parties commenting herein have leaned in the direction of common carrier regulation of intermediary activities, we find no convincing legal or policy justification for moving in such a direction. As we discuss in our Comments, given the economic and functional characteristics of these activities, there is simply no need to employ here the regulatory tools provided by Title II of the Communications Act. To do so would be to repeat the mistakes made in the regulatory treatment of brokerage in certain other regulated industries, the results of which have been stagnation and injury both to the industry and to the consuming public.

At a time when computer and communications technologies are converging to make possible new and dynamic services, it would be most unfortunate to inhibit innovation through the imposition of unnecessary regulatory constraints. It would be far better, in our judgment, for the Commission to stay its regulatory hand and permit the forces of competition and the marketplace to determine how, when and at what prices these services will be made available. Such a course would be in keeping with the view recently expressed in the Annual Report of the Council of Economic Advisors that "it is particularly important to view critically any proposals for increased regulation" and "equally important to look for ways of lessening regulation when the benefits of improved economic performance outweigh any sacrifice of other objectives." In short, there is an opportunity here for the Commission to point the way toward enlightened regulatory reform that draws on the inherent advantages of competition for the improvement of the communications industry and for the benefit of the public it serves.

I hope that you will find our analysis helpful as the Commission considers what we believe to be one of the more significant policy issues to come before it in this decade.

Sincerely,



John Eger
Acting Director

Enclosure

Copy to all parties of ~~record~~
in Docket No. 20097.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

REGULATORY TREATMENT OF
COMMUNICATIONS BROKERAGE

Comments in Docket No. 20097

February 24, 1975

Office of Telecommunications Policy
Executive Office of the President
Washington, D.C. 20504

REGULATORY TREATMENT OF COMMUNICATIONS BROKERAGETABLE OF CONTENTS

	<u>Page</u>
I. Question Presented	1
II. Basic Policy Proposal: Unregulated Entry	3
A. Legal Analysis	3
B. Economic Analysis	16
C. Conclusions	19
III. Benefits of the Proposed Policy	20
A. Cost Related Pricing	21
B. Equalization of User Opportunities	24
C. Expert Management and Marketing	24
D. Intensified Utilization	26
E. Timely Exploitation of Advancing Technology	27
F. Risk and Innovation	28
IV. Possible Impacts	29
V. Other Policy Alternatives	40
VI. Summary and Conclusions	48

I. Question Presented

The Commission has inquired into the proper classification for regulatory and tariff purposes of "resale" and "shared use" of interstate communications common carrier services and facilities. This encompasses a variety of potential applications ranging from simple aggregation of consumer demands through the operation of user associations like ARINC to more specialized "value-added" services such as the packet-switched interchange of information among remote computers. It may assist analysis to establish some broader definitions.

Brokerage may be defined as the acquisition of communications services or facilities from established or specialized common carriers and the offering of their use to third parties.

Shared Use may be defined as a form of brokerage in which the broker also satisfies a communications need of its own. If brokerage in general is permitted, shared use will obviously be allowed; the converse is not necessarily the case.

Value-added Service may be defined as a form of brokerage in which the broker enhances the communications service offered to third parties with something more than a price discount. In operational terms, a value-added service is relatively insensitive to changes in private-line or other tariffs for message transmission, whereas a "pure" or non-value-added brokerage service performs a retailing or arbitrage function that may be displaced from or shifted among various markets by changes in common carrier tariff structures.

The threshold question for any of these services is whether they constitute the provision of "communications" as distinct from data processing or other activities. If they do not, then the question of Commission regulation or tariff restriction does not arise. For present purposes, we assume that the "primary business" test developed in the Commission's Computer Inquiry decision^{1/} will continue to be applied to this jurisdictional question. Assuming that "communications" services are provided, the remaining question for Docket No. 20097 is whether and to what extent communications brokerage or any form thereof should be freed from present tariff restriction and, if so freed, should be subject to regulation by the Commission.

^{1/} Tentative Decision, Docket No. 16779, 28 FCC2nd 291 (1970) para. 42.

II. Basic Policy Proposal: Unregulated Entry

It is OTP's position that communications brokerage -- including, but not limited to, shared use and value-added service -- should be freed from present common carrier tariff restrictions, and that such brokerage does not require common carrier regulation under Title II of the Communications Act.

The remainder of this Section will examine the legal and economic grounds for the position. Succeeding Sections will consider the benefits of the proposed policy, analyze certain possible impacts on various parties in interest, and discuss other policy alternatives.

A. Legal Analysis

In its Notice of Inquiry the Commission suggested that proposals for computer-switched data communications networks such as those filed by PCI, Graphnet, MCI and Telenet, require Section 214 operating authority under the MacKay decision.^{2/} We disagree, and urge instead that the whole history and purpose of common carrier regulation establish the contrary proposition: Common carrier regulation

^{2/} MacKay Radio and Telegraph Co., 6 F.C.C. 562 (1938).

of value-added communications services and other brokerage and sharing arrangements is not required as a matter of law and would be inappropriate as a matter of policy.

The scheme of economic regulation imposed by Title II of the Communications Act is applicable only to the activity of a "common carrier." Section 3 (h) of the Act does not define this term, but the legislative history is explicit that it was intended to exclude any person who is "not a common carrier in the ordinary sense of the term...."^{3/} Title II of the Act and other provisions relating to common carrier regulation (such as Section 3 (h)) were extracted in large measure from the Interstate Commerce Act which, prior to the adoption of the Communications Act, provided for ICC regulation of communications common carriers.^{4/}

^{3/} Conference Report on Communications Act of 1934, H.R. Rep. No. 1918, 73rd Cong., 2d Sess. (1934)

^{4/} See House Report on Communications Act of 1934, H.R. Rep. No. 1850, 73rd Cong., 2d Sess. (1934); Senate Report on Communications Act of 1934, S. Rep. 781, 73rd Cong., 2d Sess. (1934).

Therefore, to aid in determining whether communications brokerage functions are subject to common carrier regulation, it is helpful to look to the regulatory treatment of comparable activities under the Interstate Commerce Act. ^{5/}

The early development of the surface transportation industry was characterized by the presence of freight forwarding companies, which supplemented the basic carriage function performed by the railroads and, later, trucking companies. The business of freight forwarders was to collect small shipments of goods, consolidate them, and reship them in bulk. In utilizing the services of the carriers, the freight forwarder paid the regular tariff rates and acted both as consignor and consignee of the shipment. By compiling carload lots, the forwarder paid the railroads the carload rate and charged its customer a rate above the carload tariff but below the railroad's less-than-carload rates.

The freight forwarders were consistently held to be shippers rather than common carriers under the original language of the Interstate Commerce Act. For example, when the railroads sought to recapture their less-than-carload traffic by

^{5/} In MacKay the Commission noted Senator Dill's report on the Senate bill: "Variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communication, rather than as a modification of Congressional intent to attain a different object." 6 FCC at 573; S. Rep. No. 781, 73rd Cong., 2d Sess. (1934).

refusing to carry forwarders' shipments, the ICC, affirmed by the Supreme Court, held that the forwarders were shippers, not common carriers, and as such were entitled to the published carload rates.^{6/}

The "ordinary sense" of the term common carrier is also illuminated by the Motor Carrier Act of 1935 and cases construing it. The Act provided for economic regulation of "common carrier(s) by motor vehicle,"^{7/} and required that any such carrier obtain a certificate of public convenience and necessity prior to commencing operation. In an effort to obtain preferential rates from the truckers at less than the published tariffs, the forwarders sought certification as common carriers, urging that common carrier status was appropriate because their business involved a holding out to the public of an offering to transport the goods of others for hire.^{8/} The ICC ruled that the forwarders were not common carriers, under the Act. This ruling was upheld in the courts.

6/ ICC v. Delaware, L&W R.R., 220 U.S. 235 (1911). See also Great Northern R.R. v. O'Connor, 232 U.S. 508 (1914); Lehigh Valley Rail Road Co. v. U.S., 243 U.S. 444 (1917); Merchants Warehouse Co. v. U.S., 283 U.S. 501 (1930).

7/ 49 U.S.C. Section 303(a) (14).

8/ This test is comparable to that employed by this Commission in defining communications common carriage. Frontier Broadcasting v. Collier, 24 F.C.C. 251 (1958).

For example, in Acme Fast Freight v. United States, 30 F. Supp. 968 (S.D.N.Y. 1940), the court upheld the ICC's denial of certification, holding that freight forwarders were not common carriers because they were not engaged in carrying merchandise directly. The court noted as a further reason why forwarders should not be held to be carriers under the Motor Carrier Act that they had never been so considered under the Interstate Commerce Act.^{9/}

Further indicative of the fact that intermediary activities were never considered to constitute common carriage in the "ordinary sense of the term" is the fact that the Interstate Commerce Act had to be specifically amended in 1950 to bring freight forwarders within the ambit of common carrier regulation.^{10/} (The reasons for this statutory amendment, and the unfortunate results it has produced, are discussed at pp. 12-13, infra.)

The evolution of "middlemen" in the air freight industry is also instructive on the meaning and scope of the term common carrier. The Civil Aeronautics Board undertook an examination of air freight forwarders in the late 1940's, assessing the type of service provided, the public need for

^{9/} 30 F. Supp. at 972.

^{10/} 49 U.S.C. Section 1002(5) as amended Dec. 20, 1950, c. 1140, Section 1, 64 Stat. 1113.

such services, and the appropriate regulatory response.^{11/} Unlike the Communications Act of 1934, the Civil Aeronautics Act establishes two separate classes of carriers: those who undertake directly to engage in air transportation and those who undertake to do so "indirectly or by lease or any other arrangement...."^{12/} The Act also permits the Board to waive the provisions of the Act for indirect air carriers.^{13/} After a comprehensive investigation of the air freight forwarding industry, the CAB concluded that the freight forwarders should not be regulated in the same manner as direct carriers, i.e., that they should not be required to obtain certificates of public convenience and necessity under the Act, but rather should merely be subject to registration by the Board. Since the market for air freight forwarding service was significant and traditionally competitive, no limitation was placed on the number of air freight forwarders that could be granted a letter of registration.^{14/}

Consideration of the CAB's treatment of air freight forwarders is relevant for three reasons. First, it demonstrates a statutory classification of air carriers

^{11/} Air Freight Forwarder Case, 9 C.A.B. 473 (1948).

^{12/} 49 U.S.C. Section 1301(3).

^{13/} Id.

^{14/} 9 C.A.B. 473, 500 (1948).

that does not exist in the field of communications common carriage under the Communications Act of 1934. The fact that special statutory language was required to bring air transport middlemen within the common carrier ambit indicates that such a function is not within the "ordinary meaning" of the term common carrier.

Second, the Board's regulatory forbearance with air freight forwarders, i.e., its decision not to require public convenience and necessity certification, indicates a recognition of the benefits of free entry by middlemen and the lack of any pressing necessity for subjecting them to the kinds of regulation fashioned for "direct" carriers. The Board noted in particular that the forwarders would operate on the basis of published carrier tariffs, which would prevent undue preferences or advantages from being extended to them. It concluded that the benefits that would accrue from competitive forwarder service outweighed any likelihood of abuse and that, in any event, it would be able to prevent any harmful results using its general powers under the Act.

Third, the Civil Aeronautics Act gave the CAB an explicit regulatory tool -- exemption from certification -- not provided to this Commission by the Communications Act. If communications brokerage activities were deemed to be

70047-21

common carrier functions, the Commission, unlike the CAB, would have no alternative but to require Section 214 certification. ^{15/} Conversely, if they are deemed to constitute something less than common carriage, Title II regulation is not available. It is true that the Communications Act affords the Commission substantial discretion in applying its provisions to the dynamic field of communications. However, as the Commission itself has recognized, there is at least a substantial question whether it can exempt from the provisions of Title II those activities which are determined to constitute common carrier undertakings. ^{16/}

The MacKay decision cannot be taken as having created a general class of indirect communications common carriers subject to regulation under Title II.

^{15/} One result of such certification is to create vested interests in opposing additional entry. Indeed, such an attitude has been expressed in the instant proceeding by DATRAN, a specialized common carrier, which stated: "To the extent that such removal (of resale restrictions) may precede the establishment and operation of specialized carriers over those routes which these, including DATRAN, have been certificated to serve, their viability is threatened." DATRAN Comments in Docket No. 20097, paragraph 25, emphasis added.

^{16/} Final Decision (Computer Inquiry), 28 FCC 2d 267, 278 (1971).

MacKay involved a conceded telegraph common carrier, already subject to the Commission's jurisdiction under Title II of the Act. The sole question in that case was whether the carrier's lease of a particular communication circuit from another common carrier could escape the necessity for regulatory approval under Section 214. To read MacKay more broadly, to require common carrier regulation of any intermediary function simply begs the question of whether entities performing such functions are common carriers "in the ordinary sense of the term."

To sidestep that question of statutory interpretation, and to focus simply on the use that is made of leased circuits, is not only to part company with the language of the Act, but also to engage in an endless "linkage" approach to regulation that would surely deter service flexibility and innovation. If anyone who retails services or facilities derived from common carrier plant is for that reason subjected to common carrier regulation, then anyone who later seeks to compete with the retailer will also have to be drawn into the protective net and so on. The only way to break this "linkage" is to ask at each step what harm or benefit to the public would result from unregulated entry. The

unfortunate consequences of an opposite approach are vividly illustrated by the pattern of transportation brokerage regulation that has developed through amendments to the Interstate Commerce Act. The freight forwarders themselves are the ones who sought common carrier status under that Act, as a means of "legalizing" rate preference arrangements they had negotiated with the motor carriers. Having failed in the courts, they ultimately prevailed on Congress to confer the desired status.

The result has been that an applicant for freight forwarder authority now has the heavy burden of proving in advance that his proposed service is consistent with the public interest.^{17/} The ICC has applied this requirement to deny new entry even when supported by shippers, if the service provided by existing firms was adequate or hypothetically could become so.^{18/} Such standards have led to severe criticism of the ICC's regulation of the forwarding industry: "The ICC treats surface forwarders as it does direct carriers; which is to say that the ICC tends to act something like the governing body of a cartel, allocating business so that survival of each mode of transportation is assured."^{19/}

^{17/} See, e.g., Frank P. Dow, Inc., 322 ICC 103, 122 (1964).

^{18/} See II Kahn, The Economics of Regulation 15 (1971).

^{19/} Wood, Intermodal Transportation and the Freight Forwarder, 76 Yale L.J. 1360, 1373 (1967).

A striking instance of what this can lead to is provided by a recent ICC action involving "pure" transportation brokerage.^{20/} A review board declined to authorize a household goods brokerage service which proposed to locate carriers for customers having difficulty moving small loads. Although the need for the service was amply documented, and none of the opposing carriers even proposed to offer a similar service, the application was rejected. This action attained prompt public notoriety as a dramatic example of the kind of misdirected emphasis that calls for regulatory reform.^{21/}

To avoid such pitfalls, it is necessary to return to the basic purpose of common carrier regulation in communications and other fields. Economic regulation of the sort that entails control of entry and of rates, and prevention of discriminatory practices, is justified solely by the presence or likely emergence of monopoly power. A monopoly may exist because of so-called "natural monopoly" characteristics, which are usually said to consist of (1) high threshold costs which limit entry to one or a few firms, or (2) substantial economies of scale such

^{20/} The Motor Carrier Act establishes a class of "brokers" who do no more than seek out carriers for shippers. Licenses are granted on a showing that the broker is "fit, willing, and able" and that the proposed service is "consistent with the public interest." 49 U.S.C. Section 311(b).

^{21/} See Washington Star News, Feb. 12, 1975, p. A20.

that a customer can be served at least cost by only one or a limited number of firms.^{22/} A monopoly may also arise out of franchises granting public rights-of-way for public utilities such as electric power, water, gas, etc.^{23/} In order to prevent unrestricted construction of transmission capacity for providing these services, governments have traditionally limited the number of such franchises, thereby conferring monopoly status on the recipients.

Once it is established that monopoly conditions are present, either because of inherent economic factors or by government-conferred franchise, regulation becomes necessary to control potential abuses of monopoly. It is necessary, for example, to assure satisfactory service to all customers, prevent unreasonably high prices, and assure efficient utilization of public resources.

A cursory examination of some of the provisions of Title II of the Communications Act reveals that the Act was, quite clearly, designed to protect against potential abuse of monopoly powers. For example:

^{22/} Cutler, Beyond the Computer Inquiry (Who Should Be Regulated in Computer/Communications), Computer Communications, Proceedings of First International Conference on Computer Communications. (S. Winkler, ed.).

^{23/} See II Kahn, The Economics of Regulation (1971).

- o Section 201(a) requires every common carrier engaged in interstate or foreign communications to furnish service upon reasonable request. Such a requirement is necessary with exclusive franchises for essential services in order to guarantee service to all members of the public.
- o Section 201(b) requires that all charges of a common carrier be "just and reasonable." This is designed to guard against extraction of exorbitant monopoly profits.
- o Section 202(a) prohibits a common carrier from making any "unjust or unreasonable discrimination in charges, practices, classifications, regulations. . . ." Again, such a requirement is necessary where there is no competitive alternative to the monopoly source of essential services.
- o Section 214(a) prohibits a common carrier from rendering any new services or constructing new facilities unless it has first obtained from the Commission a certification that the public convenience and necessity requires such new facilities or services. Such a restriction is designed to prevent wasteful or unnecessary duplication where the result would be to raise unit costs to consumers by forfeiting economies of scale.

It is readily apparent that these kinds of regulatory controls were not designed for use in a normal competitive business environment. As we discuss below, the services which are the subject of the Commission's inquiry herein are not characterized by monopoly features, and hence should not be subject to common carrier regulation under the Act.

All of this is not to say that the Commission has no powers at all to deal with potential impacts of

communications brokerage on regulated carriers. The Commission may for example, require that the carrier-broker relationship be based on published tariffs, to prevent any risk of preferential dealings. It may also follow the Computer Inquiry precedent and require the establishment of separate subsidiaries by any common carriers who may wish to engage in leasing and brokering circuits owned by other carriers. And the Commission may permit common carrier tariffs to contain reasonable terms and conditions to assure payment by brokers for the carrier services and facilities they acquire. But none of these provisions requires the application to brokers of the scheme of regulation-- in particular the restrictions on competitive entry-- established by Title II.

B. Economic Analysis

As previously stated, the basic purpose of common carrier regulation is to protect the public against abuses of monopoly power when high entry costs and/or substantial economies of scale preclude effective competition. It is evident that a "pure" broker of common carrier capacity needs virtually no investment in fixed facilities and can enter or exit the field with relative ease. Thus there is no realistic

possibility of monopoly power developing in the provision of brokerage or sharing services and no more occasion for common carrier regulation of these services than there would be of, let us say, travel agencies.

Investments in value-added services, such as computer-switched data networks, are concededly of a different order. Here again, however, the results of studies conducted by OTP indicate quite clearly that the rapidly growing business communications market can readily accomodate numerous vendors of such services and that there are no significant barriers to entry or to competition.

A study of the applications of the currently certificated value-added networks indicate that even a company using the relatively capital-intensive packet switching (ARPANET) type of technology can enter the market with an initial investment of only about \$6.5 million. This would be for a system serving 15 to 30 cities. A total investment in the \$10 to \$12 million range would be required to serve a 50 to 60 city market. The average breakeven point occurs in approximately 3.5 years at sales levels on the order of \$15 to \$20 million per year. These figures pale into insignificance when compared to (1) the cumulative gross U.S. investment of over \$100 billion in communications plant, (2) the more than \$30 billion in annual

telephone and telegraph revenues, and (3) amounts routinely raised in the capital markets for other communications purposes (e.g., the several hundred million dollars that have been raised by the specialized common carriers).

In another study, the cost characteristics of value-added network operations were analyzed in detail using the results of an earlier study of teleprocessing systems.^{24/} This study showed that the economies of scale for a single firm offering value-added services of the packet-switched type would be exhausted at a sales level of approximately \$56 to \$60 million. This level is only a fraction of an indicated mature market for value-added network services of \$500 million by 1980. Thus it should be possible for a number of value-added service firms to compete with one another without loss of economic efficiency.

We know of no studies or analyses that contradict these figures. Furthermore, even if the market were more limited in absolute terms, it would be inappropriate to restrict entry while value-added services and technologies are still in the developmental stage and before the various systems have been tested in the marketplace.

^{24/} Teleprocessing System Study, Final Report (1973) (Contract #OTP-SE-72-115).

For these reasons, and on the basis of the available evidence, there appears to be no economic justification for treating any form of communications brokerage as a monopoly service requiring common carrier regulation.

C. Conclusions

Nothing compels the Commission to treat communications brokerage service as common carriage, and the analysis in the succeeding sections tends to show that significant net public interest benefits will accrue from rejecting that classification. To the extent that limited safeguards may be deemed necessary to reserve an arm's-length relationship between carriers and brokers, they can be adopted without extending the scope of common carrier regulation to the brokers themselves.

We recognize a possible alternative alluded to by the Commission in its Notice of this proceeding and in the Computer Inquiry decision -- namely, to treat brokerage as common carriage but to apply to it less than full panoply of regulatory restraints normally applied under Title II of the Act. Even if this alternative were available under the Communications Act, and we suggest that it is not, we regard it as distinctly inferior, largely because the threat of "regulatory creep" under Title II would operate to deter the entry of risk capital into development of innovative services. There are high-technology firms that are

well equipped to provide competitive services but which have established policies against entry into regulated markets. Hence a "diluted Title II" approach would tend to be a self-fulfilling prophecy, in that it could well limit entry to the point where tighter regulation would seem necessary.

III. Benefits of the Proposed Policy

A variety of benefits can be anticipated from expanding the uses to which common carrier services and facilities may be put. Generally speaking, these can be described in terms of improved resource allocation, heightened productivity, and encouragement of innovation. In more specific terms, communications brokerage

can be expected, among other things to: (1) create pressure in the direction of more efficient, cost-related prices on the part of the common carriers; (2) equalize communication cost and service opportunities as between large and small users; (3) draw out new and presently unrecognized communications needs through improved management and marketing techniques; (4) promote more efficient utilization of common carrier plant; (5) exploit dynamically evolving technology in a timely and constructive fashion; (6) develop innovative and diversified communication services and prices more closely tailored to the specialized requirements of individual users; and (7) shift the risks and rewards for market development of untested services from the conservative, common carrier environment to the entrepreneurial milieu of the venture capital market. The balance of this Section will address each of these anticipated benefits in turn.

A. Cost-Related Pricing:

Proper pricing of communications common carrier services is important not only because of its role in insuring the efficient use of this resource, but also because of its effect on the competition the Commission has authorized in the long-haul transmission and station equipment market. Since the telephone

companies are allowed to recover all of their costs including a fair rate of return, it is possible for them to overprice certain services in order to underprice others; in other words, to cross-subsidize. If the regulated price of a competitive service is set too high relative to costs, competition from other producers is invited even though they may have higher costs. On the other hand if prices are set too low relative to costs, the entry of a potentially lower cost supplier is deterred.

It has often been suggested by the established telephone common carriers, and implicitly or explicitly accepted by the regulators, that certain forms of cross-subsidization are in the public interest. What is often ignored is the ultimate result of these price distortions. For example, when business service is overpriced, the cost of this service may be passed on to the business consumer as a hidden sales tax with typically regressive effects. The result is higher prices to the consumer for the goods he purchases and fewer of the goods being produced. This is not to say that economic support for certain classes of telephone users is necessarily bad policy, but rather that this form of hidden subsidy leads to economic inefficiencies and poses obstacles to the effective introduction of competition.

The introduction of brokerage can aid significantly in insuring that the tariffs of multiple-service common carriers are internally consistent; that is, that the price of one service is not too high or too low relative to another. It will also help to insure that the tariffs of competing carriers are consistent with each other, appropriately taking into account non-price factors such as the quality of service. The broker will accomplish this by performing what amounts to an arbitrage function. For example, if the price of one service - say, an individual voice-grade private line - is too high relative to a broadband channel, a broker could lease a broadband channel and divide it into individual voice-grade lines and offer them at a lower price than the carriers. When the carrier observes the loss of revenue resulting from the shift in customers, he would naturally amend the tariffs to bring them more in line, that is to say, to make them internally consistent.

In this fashion, and to the extent that there are cross-elasticities of demand among various common carrier services, brokerage can substitute effectively for the very difficult administrative task of policing cross-subsidization between monopoly and competitive services. The introduction of this market corrective will free

the Commission to focus more on the overall level of rates than on their structure. It should be noted that the mere threat of arbitrage can accomplish a great deal because the carriers will recognize that price inequities will attract arbitrage.

B. Equalization of User Opportunities:

Under current tariffs large firms have distinct advantages over smaller ones. The larger firms with significant communications requirements can aggregate their demands to take advantage of bulk offerings such as TELPAK. This advantage accrues to conglomerates as well, but it is not available to the separately organized small firm. This produces one pressure toward the formation of large firms that is not based on true economies but on artificial and discriminatory restrictions. Permitting smaller firms to obtain telecommunications services of roughly the same sophistication and price as are presently available to the larger firms would be consistent with the well-established national policy of encouraging fair competition and enhancing opportunities for small business.

C. Expert Management and Marketing:

Communications is a small item in many organizations' operations and as a result, telecommunications networks, once established, often are neglected until traffic patterns have so shifted as to render inadequate service. The proper and timely management

of such networks could often be improved by turning responsibility over to a third party who (a) would have an incentive to produce cost savings in order to justify his service, and (b) would possess specialized knowledge of tariffs, traffic engineering, and optimization techniques. A communications broker would be well situated to provide such management to its clients.

The expertise and profit incentive of brokers may also be expected to operate to the advantage of consumers generally. The growth and security of a broker's markets will depend upon serving customers whose needs are not being adequately met by the common carriers. Since the carriers will be stimulated to respond by improving their own services, prices, and facilities whenever possible, the broker to survive will have continually to stay a step ahead by developing and demonstrating new and innovative applications. This will require marketing techniques similar to those found in ADP-oriented markets, namely extensive education of customers in the uses of telecommunications.

The combination of expert marketing and management methods will tend to draw out new and presently unmet communications needs, and thereby to increase overall demand for basic common carrier capacity. This increased demand, when coupled with the apparent economies of scale in long-haul transmission, should tend over time to reduce the costs of all users of telecommunications.

D. Intensified Utilization:

Existing private line networks are seldom fully utilized for two reasons. First, the lines must be acquired on a full-time, 24-hours-per-day, 7-days-a-week basis. This means that the users' lines often remain idle if they require them on a steady basis only a few hours per day or if their transmission requirements are sporadic. Second, lines are only offered in discrete bandwidths. Since the bandwidth limits the rate of information transmission (speed), a user must always acquire the next largest bandwidth above his actual needs. This means that the leftover bandwidth is wasted. In these cases, where a user has excess capacity in either channel time or bandwidth, resale permission would encourage this excess capacity to be offered to others either directly or through brokers who would receive a fee for their efforts. The result would be lower costs for the users and increased productivity of plant.

Intermediaries could also offer different grades of services than are currently available from the carriers. Some users may need a lower quality of service at a lower price while others would be willing to pay a higher price for a better grade of service. For example, brokers could provide better performance on a digital network by adding error detection/correction equipment. In

this manner, brokers could furnish varying grades of services at different prices so that a given customer could obtain the exact grade needed. It is usually impractical for a large established carrier to offer service that meets all such conceivable special requirements.

With resourceful use of computer techniques, brokers can enhance the productivity of communications systems even further. Private line data systems are often used at a very low percentage of capacity, but sophisticated packet-switched systems using the ARPANET type of technology can raise the utilization to roughly 80 percent. This makes possible a 2 to 20-fold increase in productivity. Although these particular techniques remain to be fully tested in the competitive marketplace, they are an example of the improvement which may be obtained if computer technology is brought to bear by intermediaries on the needs of the communications user.

E. Timely Exploitation of Advancing Technology:

The potential applications of computer communications systems are extensive. Electronic clearinghouses may be developed, for example, in which merchandise ordering, inventory control, and funds withdrawal are accomplished simultaneously to the benefit

of all participants in the transaction. While the operation of such systems may give rise to protection-of-privacy and other policy questions, their development should not be constrained by restrictions on who may operate them.

Technology in the field of computer communications has been and is in a state of dynamic evolution. Removal of restrictions on communications brokerage will allow new and potential entrants to capitalize on advances and to promote continuing improvements in the state of the art. Competitive research and development, which would otherwise be discouraged by regulatory time lags and uncertainties, will be allowed to go forward to the ultimate benefit of the telecommunications user.

F. Risk and Innovation:

Risk taking by regulated communication common carriers in the introduction of new and specialized services is deterred by the fact that the costs of failure fall upon the general ratepayer rather than on the stockholders of the company. Since the rate of return on investment is in any event limited by regulation, and since unpopular rate increases might result from failure, the regulated carriers traditionally do not (and perhaps should not) undertake risky service offerings.

Using basic capacity supplied by the regulated carriers, brokers can effectively perform the risk-taking function. The carriers can appropriately insulate themselves from any risk in supplying basic capacity by requiring performance bonds or prepayments. In this way the broker may reap the rewards of success by accepting the risk of failure. The risks will be shifted from the general body of ratepayers to the venture capital market; unduly risky ventures will be constrained by normal operation of that market.

IV. Possible Impacts

The scale and direction of possible impacts of the proposed policy on existing carrier-customer relationships are affected by a number of independent variables whose net effect is not now known. The size and growth rate of the affected market, the pace of entry and of innovation, and the nature and timing of various competitive responses, are all untested. For example, existing carriers may be able to retain much of the relevant market through what might be called "internal brokerage"--that is, the channelizing and equipping of their own circuits for retail service offerings in competition with unregulated brokerage. Stimulation of this sort of response capability may well be one of the most salutary effects of the proposed policy.

In the discussion that follows, we shall seek to evaluate possible impacts on the various interested parties, including residential and business subscribers.

In its initial comments in this proceeding, AT&T has supplied an analysis of the effect of unlimited resale and shared use on its revenue. It estimates an annual loss of net revenue of \$178.5 million after one year. Assuming for the sake of argument that this calculation turned out to be roughly accurate, it would represent only 0.75 percent of Bell System total annual revenue and 2.0 percent of 1973 interstate toll service revenue. If the assumed loss were made up entirely by an increase in interstate message toll (long distance) rates, the increase would be only about 5 cents per call. If just the anticipated MTS revenue loss were absorbed in interstate toll rates, the increase would be about 3.3 cents per call.

AT&T further maintains that the presence of middlemen could cause forecasting difficulties, in that the "interposition of middlemen ... would make it more difficult to forecast future demands for service, and therefore to provide the optimum plant needed in the future."^{25/} There are several

^{25/} AT&T Comments in Docket No. 20097, December 11, 1974, para. 69.

aspects to this question. First, the amount of traffic subject to inroads from resale and shared use is, as indicated earlier, only a tiny fraction of the total volume. Second, an advantage of brokerage is that the established carriers would still provide the basic transmission capacity; hence, at least initially, the form and not the gross amount of traffic would change in the presence of an intermediary. Third, brokers supplying consumer groups such as user associations are apt to be in very close touch with communication trends among their customers or members and, in order properly to plan their own service, they will exert themselves to make more accurate forecasts of their demand. This activity may actually aid AT&T in forecasting. Finally carriers can readily insulate themselves from remaining uncertainties in demand through such devices as prepayments or performance bonds. Brokers can thereby serve to absorb some of the uncertainty they may produce.

Insofar as the impact on Western Union is concerned, it is clear that some of the services (e.g., facsimile transmission) being proposed by the value-added networks will be in direct competition with Western Union's TELEX/TWX service as well as with other business services such as INFOCOM and, potentially, even its declining Public Message Telegraph Service. While

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the introduction of added competition will impact on the growing part of Western Union's business, its established nationwide experience and other assets should equip it to compete effectively in all phases of the brokerage market if it chooses to do so. In many ways Western is already acting as an intermediary since it is making extensive use of AT&T services. A number of Western Union's services are in fact provided through unregulated subsidiaries. Recognizing these facts, we suggest that allowance of unrestricted brokerage should be accompanied by permission for Western Union to "spin off" to unregulated affiliates any of the types of services that could be supplied by a value-added vendor. The public telegraph service, because of its steep and continuing post-World War II decline, may merit the establishment of a separate rule-making inquiry to deal in depth with the future of the public telegraph service.

With regard to the impact on the specialized common carriers and domestic satellite carriers, it is apparent that they too will be faced with potential loss of business from (a) individual users sharing bulk discounts on the existing carriers' facilities and (b) value-added vendors supplying specialized services similar to those proposed or offered by the specialized

common carriers. On the other hand, technically sophisticated user groups and brokers should represent attractive aggregated markets for specialized and satellite carrier services; we note for example that ARINC, which serves as a kind of broker to the airlines, has ordered lines from at least one of the specialized carriers.^{26/} Furthermore, these carriers should also be in an excellent position to enter the brokerage market themselves--through subsidiary companies--and to take advantage of the very tariff rates (either justified or unjustified on a cost basis) that might otherwise dissuade them from constructing their own plant.

We recognize that if the net impact on the specialized common carriers were sufficiently adverse, in combination with other factors, to drive them entirely out of the carrier business, this would remove from the market a healthy competitive spur to development and deployment of innovative terrestrial transmission technology. This result seems unlikely, however, particularly in light of the other revenue-producing business opportunities that may be opened up and the corrective effect that brokerage will exert over time on any cross-subsidized

^{26/} ARINC filing in Docket No. 20097, December 11, 1974, footnote 49.

competition from established common carriers. We believe in any case that foregoing the substantial benefits of unregulated brokerage would be too high a price to pay for sheltering the specialized common carriers against speculative damage.

The value-added networks that are already licensed will face additional competition as a result of unrestricted resale but, as was previously stated, our studies have led us to the conclusion that the market can readily accommodate numerous vendors of this type.

The most critical test of the liberalized resale policy is its ultimate impact on the telecommunications-using public including both residential and business subscribers. Residential telephone subscribers could be directly affected in two ways-- by changes in interstate toll rates and, through separation effects intrastate toll and local exchange rates. As to the first, the impact on the average cost per long distance call was computed earlier and shown to be small. It is true that diversion of toll traffic on high density routes to shared private line circuits could lead to some de-averaging of interstate toll rates. There are other factors, however.

First, the actual amount of the diversion may be small, especially after the expected realignment of TELPAK rates. In fact, with true cost-based pricing stimulated by removal of brokerage restrictions, the established carriers should be economically indifferent to how a given call was handled as long as it remained on their network.

Second, transmission is only a part of the cost of a long distance call and the remaining factors (e.g., billing costs) are insensitive to distance. Hence higher transmission costs along a lower density route may not lead to a proportionate increase in toll rates as compared with a higher density route.

Third, for calls over very great distances where the costs of transmission become a larger percentage of the total cost, it is likely that the call would be routed over high density facilities for a significant part of the haul even if the terminals were located in rather remote locations.^{27/}

^{27/} In its comments in this proceeding, AT&T uses calls from New York to Chicago and from Tucker, Georgia to Aldine, Texas as examples of dense and sparsely trafficked routes of roughly equal length. Since Tucker, Georgia is on the outskirts of Atlanta and Aldine, Texas is on the outskirts of Houston, it would be fair to assume that a call from Tucker to Aldine would be routed over high density facilities between Atlanta and Houston.

Finally, departures from nationwide rate averaging may not be inconsistent with the public interest. Granted that the Commission is mandated to regulate so "as to make available to all people of the United States rapid efficient nationwide and worldwide communications services with adequate facilities at reasonable charges," prices based on the cost of providing a service do not appear unreasonable, especially when they are not greatly disparate.

The impact of brokerage activity on payments made through separations procedures, and hence on intrastate telephone rates, will also be small on a percentage basis. The situation could be aggravated somewhat under current procedures if there are shifts from message toll service (MTS) to private line service, since the effect would be to shift costs from interstate to intrastate traffic thereby putting upward pressure on intrastate rates. This is linked with certain anomalies in existing separations procedures, which could readily be changed. Private-line messages, which are currently recorded as intrastate even when they cross state boundaries, could be reclassified so as to earn their proper share for local companies of the interstate revenue "pie" allocated under separations. Indeed, a general revision of the separations procedures may

well be required to account for the introduction of competition in the long-haul and station equipment markets. This very issue is a subject of inquiry in Docket 20003 dealing with the "economic implications and inter-relationships arising from policies and practices relating to customer interconnection, jurisdictional separations, and rate structures."

The foregoing factors affecting local exchange and intrastate toll rates for residential users apply to business subscribers as well. In the long term, however, business subscribers may be faced with major modifications to the WATS and TELPAK tariffs. While the trend toward more cost-related pricing may result in increased costs for larger customers, liberalized resale should make whatever true economies there are in bulk services available to all users large and small. In particular, if AT&T's position regarding the existence of genuine WATS economies is correct, then a cost-based, usage-sensitive WATS price structure would appear to be an attractive alternative to MTS for bulk customers.

If TELPAK prices go up because of brokerage activities, it will increase the attractiveness of private microwave systems to large customers. However, it may be unwarranted to expect any large diversions to such systems. The current TELPAK rates

are generally considered to be low enough to leave room for considerable price increases before private systems become economically viable alternatives. Furthermore, inflation and environmental factors may well have increased the costs of private microwave systems. For these reasons, the likely diversion to private systems would not appear to be significant in terms of total interstate traffic.

Finally, we must consider the possible detrimental effects on service of the interposition of a middleman between users and the telephone company. It should be made clear that we are not proposing the brokerage of local exchange service, nor are we proposing a situation wherein a subscriber could not obtain service without dealing through a middleman.^{28/} A major advantage of brokerage activity is to increase the leverage of individual users in dealing with communications carriers. The subscriber, operating individually or through a user association, should be perfectly able to judge whether

^{28/} Thus, adoption of the policy proposed herein would not run counter to decisions of this Commission, state regulatory commissions, and the courts, upholding tariff provisions prohibiting hotel and apartment owners from "reselling" telephone services to the captive clients who are their guests or tenants. See, e.g., Ambassador, Inc. v. United States, 325 U.S. 317 (1944) and cases cited therein.

he is benefiting from brokerage activities. If he feels he is not receiving "added value" in the broadest sense of the term, then he is perfectly free to deal directly with the carriers and we expect the telephone companies to point out the advantages of doing so.

V. Other Policy Alternatives

Several regulatory options have been suggested. Each of these has points in its favor as well as some disadvantages. While any option more liberal than the status quo would represent some improvement, none of the alternatives we have examined yields as much net benefit as can be gained from simple, unregulated communications brokerage. In this Section we shall seek to evaluate the more prominent of these other alternatives.

(1) Limit Brokerage to Non-Discounted Lines: This would tend to exclude "pure" brokerage or arbitrage operations, in which the broker seeks out price advantages for customers, and arguably performs no other communications enhancement function. It would also tend to minimize the drain on telephone company revenues.

This option has the advantage of yielding most of the benefits available under unlimited brokerage. There would remain the incentive to introduce new services and applications, users would be able to secure expert management of their networks, and improved data handling techniques could be rapidly deployed. There would be some specialized marketing with a resultant possible increase in total demand, though to a lesser extent than with unlimited brokerage. And for innovative services there would still be a way for risk to be taken by new entrants without the ultimate

liability having to be carried by the ratepayers.

On the other hand this option carries little benefit for the small user in comparison with the large user. The large user would still be able to aggregate requirements and obtain a discount. The small users would not be able to band together or to have an agent make the aggregation for them. In effect this option would perpetuate the existing rate discrimination in favor of large corporations and conglomerates.

Furthermore, the "pure" broker who makes his living off of price discounts performs a socially and economically valuable service. It is very difficult for the Commission to police carrier tariffs to determine whether particular rates are compensatory or are unjustifiably cross-subsidized by rates for other services. This is evidenced by the long-pending TELPAK rate inquiry (Docket 18128). If brokers are allowed to trade on TELPAK rates, and if these rates are not carrying their proper share of the revenue load, the carrier will be obligated by economic self-interest to alter the tariff. If on the other hand the rates are based on genuine cost savings arising from bulk delivery, the carrier will be indifferent to their broadened use and customers will benefit.

In the absence of such market determination, it would be very difficult to draw an accurate dividing line between "discounted" and "non-discounted" services and facilities. If that

task were left to the carriers, they would have an incentive to draw it so as to minimize the scope of permitted brokerage.

For these reasons, the Commission should not cut itself off from the regulatory and service benefits available through brokerage of discounted lines.

(2) Require "Value-Added" Showing or Certification Before Entry: This would again tend to exclude "pure" brokers and would limit entry to firms that could show they were going to provide applications or services that would enhance the communications value of leased circuits. These firms would trade on the value they bring to the industry and would not be simply creatures of the tariffs.

There are several flaws in this option, in addition to those previously discussed in connection with Option "(1)". First, the mere requirement that entrants obtain the permission of the FCC contains in it the implicit threat that at some future time the Commission may withdraw its permission or impose additional restraints. This "chilling effect" may well keep some of the most able value-added entrants out of the market. As an example, some time-sharing firms have excellent nationwide

data networks in existence.^{29/} Their entry in full into the value-added marketplace would assure sufficient competition to make regulation redundant. Yet, the spectre of regulation could diminish entry to so few firms as to warrant regulation.

In addition, barriers to entry can easily become barriers to exit. Open exit is a requirement if management errors or misjudgments are not to be ultimately passed on to consumers.

There is also the very real difficulty of determining added "value" in an administrative proceeding in advance of market experience. To potential customers, value may take many forms including management expertise and service efficiencies that are hard to quantify. Benefits are best determined in the marketplace, where those with the most value to offer will reap the highest reward.

A value-added certification approach would also give rise to various sorts of attempts to evade the will of the Commission. For example, bulk discount tariffs would provide an incentive for sham "value added" service offerings, which would be administratively difficult to distinguish from the genuine article. The result would be covert brokerage. Covert

^{29/} These firms are presently restricted to use of voice-grade or lesser circuits, and to professedly non-profit sharing of excess capacity on lines they use to access their own computers. See, C.G., Comments of Telenet in Docket No. 20097, December 11, 1974, pp. 28-30.

activities are inherently discriminatory since some members of the public may be unaware of them. The Commission would be required to devote scarce resources to policing of the value-added vendors and to resultant litigation.

(3) Limit Brokerage to Non-Profit Sharing: This option would put small business customers on a par with larger business firms insofar as communications costs are concerned. But it would remove from the potential brokerage industry the spur of the profit motive, and would thereby greatly diminish the rate of introduction of innovative services. In particular, society would lose the benefits to be gained by open entry of value added service vendors.

This approach would also tend to lead the FCC into adjudication of disputes over the status of entities. It is difficult to determine whether or not sharing of communications facilities and services is actually being conducted on a non-profit basis. Especially if volume discounts are available, there would be a strong temptation to organize sham non-profit arrangements. As earlier mentioned, very little capital is needed to establish a brokerage operation. An adequate return on a modest investment can be taken as salary by the organizing officers.

(4) Restrict Brokerage to User Associations: Many of the emerging applications could be developed by user associations as services for their respective industries. This would,

however, restrict the flow of information between industries and would not open the marketplace as needed for the benefit of the general public. Furthermore, this approach could lead the Commission into all the problems of definition and supervision of "affinity groups" that have plagued the Civil Aeronautics Board. If there are benefits to be gained from brokerage they should be made available to the general public and should not be established as the exclusive preserve of trade associations.

(5) Allow Brokerage Only on Data Circuits: Brokerage in tandem with liberalized equipment and systems interconnection could conceivably lead to some competition with interstate message telephone service (MTS), as brokers make long-distance transmission and switching capacity available for use by a variety of customers. The basic transmission plant and associated revenues would still remain with the carriers, and it is unlikely that brokers could provide either the customer convenience or the economies of scale to effect any significant diversion of traffic from interstate MTS. Furthermore, whatever actual or potential competition there is would act as a force towards cost-based pricing by the carriers, which would be generally beneficial for the reasons previously discussed. Nevertheless it may be appropriate to monitor developments in this particular field and to consider possible preliminary or test policy formulations that would minimize any apprehended risks of harm.

The majority of the emerging brokerage applications deal with data. A policy formulation restricted to data uses would permit these applications to proceed. There would be some productivity gains as sophisticated data-handling techniques became available to more users. This approach would place large and small users on the same footing as far as data communications is concerned.

There remain a number of objections to this course. While most of the current concepts are data oriented, this does not mean that new applications will not emerge in non-data areas in the future. Many circuits even today are alternately used for data and voice. To limit such lines to data alone would erode the productivity of the circuits.

Technology is already exerting pressures to blur the distinction between data and voice. Digital transmission facilities are being deployed by the carriers. Enhancement techniques are being used to encode and transmit on a single channel several voice messages as digital information for reconstruction at the receiving terminal. Encryption techniques sometimes involve the use of digital transformations of voice. Computers already possess voice answer-back capability which permits inquiry from touch tone terminals. Research is being conducted in voice recognition systems. Thus it may be assumed that at some time in the future data will be entered and retrieved in a voice mode. It will

become increasingly difficult to articulate and enforce a workable distinction between data and voice circuits or services.

For these reasons, it would be preferable not to attempt any such regulatory distinction but instead to monitor developments and to institute rulemaking proceedings at a later time if any serious diversion of traffic from interstate MTS should occur.

VI. Summary and Conclusions

Communications brokerage -- encompassing resale, shared use, and value added applications of common carrier services and facilities -- is a function that should be freely open to competitive entry and should not be restricted by, or to, common carriers.

The purpose of communications common carrier regulation is to protect against abuses of economic power in that sector of the industry regarded as a natural monopoly. Brokerage activity does not fall within that sector. Brokers will use the capacity of existing carriers and will not themselves make major plant investments. Therefore, their operations will not be characterized by high entry costs or by economies of scale sufficient to preclude effective competition.

Unregulated brokerage can be expected to produce significant net benefits in the form of improved resource allocation, heightened productivity, and innovative service applications. More particularly, communications brokerage among other things will:

- ° Create pressure in the direction of more efficient, cost related prices on the part of the common carriers. Brokerage can aid significantly in insuring that the tariffs of common carriers are internally consistent by performing a function that is closely related to classical arbitrage. The introduction of this market corrective process will aid in the very difficult administrative task of policing cross-subsidization between competitive and monopoly carrier services.

- ° Allow for a more equitable distribution of communications costs and services between large and small users. Under current tariffs, large firms or conglomerates have distinct advantages over smaller ones in that they can take advantage of bulk discounts such as TELPAK and operate sophisticated systems that are beyond the economic reach of smaller firms. Brokerage activities can aggregate the demands of small firms to overcome this discrimination.
- ° Draw out new and presently unrecognized communications needs through improved management and marketing techniques. Brokers will have the specialized knowledge of operations, tariffs, traffic engineering, and network optimization techniques as well as the profit incentive to seek out unmet communications needs and thereby to expand over-all communications demand with resultant lowering effects on unit costs for all consumers.
- ° Promote more efficient utilization of plant. Existing private line networks are often under-utilized, and liberalized resale would encourage the offering of this excess capacity to others, either directly or through brokers. Intermediaries could also offer different grades of service at different prices so that a given customer could obtain and pay for only the grade of service required by his application.
- ° Exploit dynamically evolving technology in a timely and constructive fashion. The potential applications of computer communications systems are extensive and the technology is rapidly changing. Removal of restrictions on brokerage will allow new and potential entrants to capitalize rapidly on advances in the state of the art and to pursue competitive research and development of innovative services.
- ° Shift the risks and rewards for market development of untested services from the conservative environment of regulated common carriage to the entrepreneurial milieu of the venture capital market. Risk taking by the established carriers is deterred by rate of return regulation. Using basic capacity supplied by the regulated carriers, brokers can effectively perform the risk-taking function and the carriers can appropriately insulate themselves from risk by requiring performance bonds or prepayment on the part of the brokers.

There will of course be some disadvantages to particular parties. Communications brokerage will alter the status quo in a variety of ways, some of which may be detrimental to revenues or costs of existing carriers or classes of customers. In the main, however, adverse impacts are relatively minor and seem to be well within the capacity of the affected entities to absorb. These detriments to a few are, moreover, indicative of the benefits that customers as a whole may expect to derive from communications brokerage. There will no doubt be a number of particularized economic adjustment questions to consider, including the modification of separations procedures to safeguard interstate toll revenues. These issues can, however, be accommodated in existing proceedings such as Docket 20003 or in further proceedings resulting from the implementation of the unrestricted brokerage policy.

The Commission may also employ its authority over existing common carriers to assure an arm's length relationship between carriers and brokers. It may require that the relationship be based on published tariffs, allow carriers to obtain reasonable assurances of broker payment for lease of carrier circuits, and insist on corporate separation of brokerage and common carrier activities.

Beyond these particular conditions, any limitations on brokerage activity can best be left to market forces and to the provisions

of generally applicable law. There is nothing in the terms or history or purposes of the Communications Act to require a contrary result, and if necessary the Commission should rule specifically on the applicability of the MacKay case to make that clear. Otherwise the Commission will find itself progressively drawn into the same morass of protective regulation that has provoked so much criticism of transport carrier regulation.

REPLY COMMENTS
OF THE
UTILITIES TELECOMMUNICATIONS COUNCIL

The Utilities Telecommunications Council (hereinafter sometime referred to as "UTC"), by its attorney, hereby submits these Reply Comments responsive to the Comments filed in this proceeding by certain other parties.^{1/}

SUMMARY OF POSITION

1. In its initial set of Comments filed in this proceeding, UTC presented arguments as to why there was a need for sharing of common carrier circuits, both voice and data, among electric, gas and water utilities at least to the same extent that these utilities can share their private microwave systems. UTC also reviewed why the current provisions in the established carriers' tariffs which permit corporate entities with a "parent-subsidiary" structure to

^{1/} American Telephone and Telegraph Company (AT&T), Data Transmission Company (DATRAN), GTE Service Corporation (GTE), MCI Telecommunications Corporation, et al (MCI), and Southern Pacific Communications Company (Southern Pacific).

be treated as a single customer are necessary to give companies with that type of structure the same latitude as companies which have only one corporation with multiple "divisions". UTC's Comments also pointed out that the similar provisions which treat "power pools" as a single customer for service and circuits necessary for the coordination of the power pool were justified by sound public policy considerations and even competitive reasons.

2. UTC is still of the view that the communications common carriers, be they "established" or "specialized", could, with sound justification, provide for the very limited expansion of true "sharing" of common carrier circuits as was urged by UTC in its Comments, without any real risk of substantial adverse impact on revenues, on the rates paid by others, or on common carrier service. Similarly, nothing has been shown in the Comments filed by the other parties which demonstrates that the "parent-subsidiary" and "power pool" single user provisions result in unjust or unreasonable discrimination or subject any person or class of persons to undue or unreasonable prejudice or disadvantage or give any unreasonable preference or advantage. A few of the Comments, however, do raise points which UTC believes warrant further discussion.

SHARING OF COMMON CARRIER CIRCUITS

3. Some of the parties (e.g., AT&T and GTE), have raised concerns over the impact on carrier revenues, rates and service from what was described as "unlimited sharing" of common carrier facilities. Others have indicated a desire to provide for some additional sharing but with limitations such as that each participant in the sharing arrangement have a communications requirement of its own, and that the sharing arrangement be on a non-profit, cost sharing basis, such as provided for in the Commission's rules governing the sharing of private microwave systems (e.g., Southern Pacific). UTC recognizes that some of these concerns may be valid and would agree that changes in policy governing the sharing of common carrier circuits should be carefully considered and implemented in such a way that there would not be any widespread adverse impact.

4. The same is true with respect to changes in the policy on sharing of any communications facilities, including private microwave. For example, in Docket No. 19869^{2/} the Commission is considering permitting Business Radio Service users to have access to private microwave frequencies below 10 GHz, coupled with wide open sharing whereby anybody

^{2/} Docket No. 19869, In the Matter of the Amendment of the Commission's Rules to Establish Private Operational Fixed Microwave Radio Service (Part 94), FCC 73-116, 07029.

having access to the same frequencies can enter into private microwave "sharing" arrangements. Although UTC's primary concern with that proposal is the very adverse impact it will have on already existing frequency congestion in the bands below 10 GHz, UTC also recognizes that this proposal also could have a very severe impact on common carrier revenues. Under the proposed wide open sharing and with the added incentive of access to the highly desirable bands below 10 GHz, "entrepreneurs" will be able to put together "shared" systems of business and commercial users whose primary interest in the microwave systems is not an operational requirement, as is the case with the utilities, but rather, merely a desire to reduce telephone costs. UTC expects that the impact will be particularly heavy on an intrastate basis where it would be most easy for these "entrepreneur" created "shared" private microwave systems to be economically justified.

5. Thus, it may well be that similar adverse results would flow from "unlimited sharing" of common carrier facilities. However, the limited expansion of sharing advocated by UTC can be justified in the public interest and would certainly not have the adverse impact of unlimited sharing. UTC is not urging the type of unlimited sharing

with which the established carriers are concerned, such as the very unwise proposal advanced by the Commission in Docket No. 19869. In fact, the Commission does not even have to go as far in encouraging sharing of common carrier circuits as is found in the existing private microwave sharing rules. The present private microwave sharing rules (e.g., §91.9(b)) provide for sharing in only two situations: (1) persons licensed in or eligible to be licensed in the same radio service (e.g., Business Radio Service) and, (2) Government entities, right-of-way companies or enterprises whose rates and services are regulated by a governmental authority, regardless of whether such entities, companies or enterprises are licensed or eligible to license within the same radio service. The first of these categories, "the same radio service", is akin to the "same line of business" and perhaps this would be too broad a basis at least initially, for any revisions in the policy governing the sharing of common carrier circuits.

6. UTC's suggested expansion of sharing of common carrier service is, essentially, the same as the other category of private microwave sharing, namely, sharing among governmental entities, right-of-way companies and rate regulated entities. Incidentally, originally sharing of

private microwave systems was only permitted among these three categories because, as the Commission stated in its Report and Order in Docket No. 11866, "it is evident that any economic benefits flowing out of such an arrangements will assuredly flow directly back to the public, either as taxpayers or rate payers."^{3/} Thus, perhaps as was initially the case with the sharing of private microwave systems, the Commission should confine the expanded sharing of common carrier service to the sharing of circuits among governmental entities, right-of-way companies and rate regulated entities. Apart from the economic benefit flow justification mentioned above, there might even be a "competitive" justification. In most cases, governmental entities, right-of-way companies and rate regulated entities are heavy users of private microwave systems, such as the electric, gas and water utilities. While the utilities primarily build and construct their microwave systems because of operating requirements and the necessity for these critical facilities to be under the absolute control of the utility, these microwave systems also can be, and are, used to also meet communications requirements which could be filled by common carrier circuits (e.g., where utility control of the facilities is not necessary or to provide redundancy) especially

^{3/} In the Matter of Allocation of Frequencies in the Bands Above 890 MHz, 27 FCC 359 (1959).

if the common carrier rates are not competitive. In fact, once the operational requirement for a private microwave system exists, it only makes sense that the private microwave licensee will look to additional savings which could be made by eliminating common carrier costs. Thus, if common carrier service could be made more economically attractive through sharing arrangements, it would remain "more competitive", where it can compete at all with private microwave.

SINGLE USER PROVISIONS

7. Some of the Comments seem to indicate that the "single user" provisions are a means of accomplishing "sharing" of common carrier facilities. UTC does not believe that the single user provisions with which it is concerned,^{4/} necessarily result in sharing, in the normal sense. Rather they are more properly a means to treat a group of related entities as a single person, and this may or may not result in "sharing". For example, the "power pool" provision simply permits a single entity, such as the Power Pool Center, to order the circuits needed by the constituent members of the power pool to intercommunicate concerning the coordination and exchange of electric power to

^{4/} The "parent-subsidiary" provision, AT&T's FCC Tariff No. 260, §2.2.1(c) and the "power pool" provision, AT&T's FCC Tariff No. 260, §2.2.1(f).

- 8 -

meet the public's demands. In other words, these are parties talking to each other concerning a matter of mutual concern (transferring of electricity) and not two or more parties sharing the same circuit for traffic which is exclusively for each party's own benefit. Thus, UTC does not believe it is proper to equate, in all cases, the single user provisions with "sharing". It is primarily a device to recognize that certain entities should be treated as one "customer" for administrative convenience. It should be kept in mind that this "power pool" provision was included in the tariffs to avoid a situation whereby if the engineering and the ordering of new multi-point facilities between members of a power pool had to be done by each member it would be so complicated that service dates could, in no way, be met.

8. Also, UTC notes that certain of the "specialized" carriers urge, in varying degrees, elimination of the single user provision. For example, MCI allows that provisions of this type appear to be discriminatory on their face. DATRAN alledges that there is no justification for the provisions, in that they are prima facie violations of §202(a) of the Communications Act of 1934, and their removal must be ordered by the Commission as soon as practicable. It appears that the primary reason DATRAN would deny corporations which happen to have a "parent-subsidary" structure

the ability to order circuits as a single customer as their "single corporation-division" competitors may do, and likewise, would deprive the power pools the operating and administrative efficiencies of permitting the Power Pool Center to order circuits for the other members of the pool, is to enhance DATRAN's competitive position (to the detriment of communications users) because it argues at page 39 of its Comments, that these single user provisions "foreclose significant user market segments from specialized common carriers, and must be removed." Apparently, here, as in other areas (e.g., DDS service), DATRAN is of the view that competition is great for the established carriers but not so great for the specialized carriers. UTC notes, however, that not all of the specialized carriers have taken such an unreasonable position on the "single user" provisions. For example, Southern Pacific takes the much more rational approach that single customer provisions may be found to be just and reasonable where the specified groups of users possess unique attributes of unity and central administration which permit the user groups to be considered as a single entity for purpose of tariff application.

9. For the reasons explained above, the "parent-subsidiary" and "power pool" single user provisions are situations where it is clearly in the public interest, to

- 10 -

treat a group of related entities having a common communications requirement as a single user or customer of telephone service. These two "single user" provisions, at least, are not "gimmicks" to accomplish sharing of common carrier service. Irrespective of what the Commission may do with regard to the expansion of sharing, there will still be a requirement, UTC submits, for provisions like the single user provisions to permit entities such as power pools or corporations with a parent-subsidiary relationship to be treated as a single customer for tariff purposes.

WHEREFORE THE PREMISES CONSIDERED, UTC urges that the Commission encourage the communications common carriers to move forward with provisions for the sharing of common carrier service, voice grade and data, among Governmental entities, right-of-way companies, and rate regulated entities. Irrespective of what action it might take regarding such expanded sharing, the Commission should continue to permit the communications common carriers to retain provisions whereby power pools can be considered as a single customer for the use of common carrier service needed for the coordination or exchange of electrical pool power and whereby corporations which happen to be organized with a "parent-subsidiary" structure can be treated as a single entity. In fact, the present tariff provisions seem to limit the "parent" to being the "customer". UTC would suggest that this provision

- 11 -

be modified to also permit a subsidiary to be the customer for its parent and sister subsidiaries of the same parent. Incidentally, this is the same approach the Commission has always used with regard to eligibility in its various radio services, such as the Power Radio Service. This is important because, in many cases, the communications staff normally responsible for securing the communications service used by a corporation is in a subsidiary "Service Corporation" or one of the "operating" subsidiaries of the parent company. The point is, that such corporate entities should be treated as a single customer, and it should not make any difference whether the "parent" or one of the "subsidiaries" is the "customer".

Respectfully submitted,

UTILITIES TELECOMMUNICATIONS COUNCIL

February 24, 1975

REPLY COMMENTS

American Telephone and Telegraph Company ("AT&T"*) respectfully submits these Reply Comments, pursuant to the Notice of Inquiry and Proposed Rule Making ("Notice") (47 F.C.C.2d 644), as modified as to filing dates by the Order of the Chief, Common Carrier Bureau, released January 9, 1975 (FCC No. 45005).

1. AT&T's initial Comments herein ("AT&T's Comments"), filed December 11, 1974, took the position that unlimited resale and sharing** should not be allowed. It was shown that the result of such a change would be, at a minimum, a loss of net revenues*** of approximately \$178 million in the first year,

* Appended hereto is a list of abbreviations used in these Reply Comments for parties to whom reference is made.

** As used herein, "sharing" or "shared use" occurs when each of the users sharing the service has a communications need of its own and there are no intermediaries between the Telephone Company and the user. Resale involves a common carrier's customer subscribing to service and then reselling the service, with or without a profit, to a user who is a customer of the intermediary, not of the common carrier.

*** Including effects on both revenues and costs.

a net revenue loss which would, other things remaining equal, have to be made up by repricing services. It was also shown that increased sharing or resale would change the revenue/cost relationships involved in present interstate offerings, particularly in WATS and TELPAK. The result would have to be substantial increases in the overall service rates for these offerings, as well as for other offerings. In the case of WATS and TELPAK, the restructuring and repricing necessitated by unlimited or greatly increased resale and sharing would impair their attractiveness and utility to customers and would be contrary to the fundamental concepts of these offerings, if the offerings could survive at all. In addition, it was shown that because resale and sharing would be more prevalent on the busier routes, further departures would be made from the principle that rates for like services should be uniform for like distances, despite differences in route costs. Such a deaveraged price structure may result in higher rates for residential and small town business subscribers. There would also be effects on jurisdictional separations, due to different usage characteristics, with consequent changes required in local service rates. Finally, it was shown that unlimited or increased resale could result in service difficulties. AT&T's recommendation was that any modification of the present resale and sharing provisions should be on a case-by-case basis, with the party advocating the modification bearing the burden of justifying it.

2. The Comments filed by other parties do not impair in any way the position that unlimited or greatly increased resale and sharing should not be permitted. Indeed most of those commenting on the point expressly oppose such expansion of resale and sharing. This will be discussed in Part I of these Reply Comments. In Part II there will be discussed various suggestions made by other parties for limited changes in the present resale and shared use provisions.*

* Certain matters discussed by other parties are not within the scope of this proceeding and will not be addressed. These include:

- (1) Issues involving carrier-to-carrier facilities, for example, MCI's contention that all certificated carriers should be able to obtain facilities from other certificated carriers. It is worthy of note that MCI took no such expansive position in a Reply, dated February 10, 1975, in connection with Petitions to Suspend certain MCI tariff provisions which were proposed in MCI's Transmittal No. 24, dated January 6, 1975. Specifically, MCI objected to SPCC's being permitted to subscribe to MCI circuits at a bulk rate, and then as a broker, reselling those circuits at a retail rate to its own customers (MCI Reply, pp. 7, 8). Likewise, the demand of American Satellite and SPCC that AT&T make available other than voice grade facilities on the same basis as voice grade facilities to "other common carriers" is not at issue herein. This subject is being discussed in the current settlement negotiations in F.C.C. Docket No. 20099.
- (2) The question raised in the Comments of Western Union of the lawfulness of TELPAK rates is at issue in Docket No. 18128.
- (3) Whether there should be changes in the provisions relating to the interconnection of terminal equipment or in terminal equipment requirements (see Comments of AAR, NATA and CBEMA) are at issue in the Joint Board Docket No. 19528, as well as in Docket Nos. 19419 and 19691.
- (4) The Wells' proposal primarily concerns the provision of local exchange service to hospitals and is not at issue before this Commission.

I. UNLIMITED RESALE AND SHARING
SHOULD NOT BE PERMITTED

3. As demonstrated in AT&T's Comments, unlimited resale and sharing, or any substantial changes in the existing provisions, will alter the revenue/cost relationships of existing service offerings. Unlimited or significantly expanded resale or sharing may require changes in the nature of service offerings, may detract from the ability of the telephone company to provide good service, and is likely to cause increases in the rates for the basic interstate service, message telecommunications service (MTS). No participant in this docket has proposed such unlimited sharing and resale.*

4. Many of the parties submitting Comments share AT&T's concern over the harmful consequences of unlimited or greatly expanded resale and sharing. Several common carrier parties stress the diversion of revenues which would result from wholesale changes in the resale and sharing provisions** and the adverse effects thereof on rates, services and pricing principles.*** Two Specialized Common Carriers acknowledge

* While NAM endorses a policy which would permit resale and sharing with a minimum of regulatory red tape, it states that it opposes any resale which would add a new level of telecommunications vendors or brokers.

** GTE, paras. 1-5, 1-13, 2-4; United, p. 6; MCI Reply to Comments on Petition for Rule Making, R.M. No. 1997, para. 34; SPCC, para. 7.

*** United, p. 6; SPCC, paras. 6, 7; GTE, paras. 2-3, 2-7; Western Union, para. 1; Telenet, paras. 21, 22.

that the elimination of resale and sharing prohibitions could adversely affect competition among carriers.* Other parties caution that removal of restrictions could create a chaotic condition in the industry by undermining AT&T's rate structure and by shifting revenue burdens to users of basic exchange and MTS.** One user group states that its members would save \$17 million if they could share services (ATA Comments, paras. 41-43). Since most of the savings would be accomplished by substituting bulk rated services for individual lines, there would be no comparable savings to the telephone carriers, and hence other customers would have to pick up the tab for the savings to ATA's members. It appears to be generally agreed that wholesale changes in the existing resale and sharing provisions would affect the very structure of the communications industry.

II. SPECIFIC CHANGES SUGGESTED BY PARTIES

1. Resale and Sharing of Bulk Rated Services

5. A number of communication users have suggested that their own, and perhaps, other industry user groups be permitted to share communication services. Their principal objective is to permit members to combine their communications needs to take advantage of bulk rates, otherwise not available

* DATRAN, para. 25; MCI, para. 8.

** GTE, paras. 2-3, 2-7; United, p. 6; SPCC, para. 6; Telenet, paras. 21, 22; Western Union, para. 18.

to them individually. As shown in AT&T's Comments, sharing of TELPAK by these parties and others would have cross-elastic effects which would change the revenue/cost relationships of the services. In particular, the average fill of TELPAK would rise toward the maximum, thereby increasing TELPAK costs without a comparable increase in revenues, and decreasing overall revenues without a comparable decrease in costs. These cross-elastic effects would require rate changes in TELPAK, as well as in other services, and could well result in the elimination of the TELPAK offering.*

6. This Commission has held that to allow TELPAK sharing to some, but not all customers, is discriminatory, and its decision in this regard was affirmed by the Court of Appeals (In the Matter of TELPAK Sharing, 23 F.C.C.2d 606 (1970), reversed in part, American Telephone and Telegraph Co. v. F.C.C., 449 F.2d 439 (2d Cir. 1971)). To eliminate such discrimination, AT&T removed all provisions for sharing from its TELPAK tariff, an alternative permitted by the decision of the Court of Appeals. The parties who now request that TELPAK sharing be extended to them - or in the

* GTE (para. 2, 3) and DATRAN (para. 47, 48) comment that TELPAK sharing would increase the cost of providing the service and might lead to its demise. Telenet (para. 21) recognizes that rate restructuring could result from TELPAK sharing. MCI (para. 17, 18), GTE (para. 2, 3), DATRAN (para. 47-48) and Telenet (para. 21) state that the existing prohibition against TELPAK sharing aids in preventing the establishment of arbitrage as an industry.

alternative, that the single customer provisions be enlarged - clearly have the burden of showing that this would be lawful and not unreasonably discriminatory under Section 202(a) of the Communications Act.* There has been no such showing.

2. Resale and Sharing of Discrete Wideband Private Line Services

7. DATRAN proposed that sharing of discrete wideband channels should be permitted. DATRAN correctly states that such sharing would result in carriers competing with themselves through sharers of the wideband service, and that this would in turn result in an erosion of revenues. DATRAN questions, however, "whether, on balance, this is sufficient reason to continue to deny economies and efficiencies that may accrue to the using public by an extension of sharing opportunities." DATRAN overlooks the fact that AT&T's discrete wideband channel offerings are designed for specialized communications needs. Likewise, the rate structure for discrete wideband offerings was designed for this specialized usage. The communications needs of the individual users envisioned as sharers by DATRAN are met today by other existing service offerings. To permit shared use could result in consequences similar to those enumerated in AT&T's comments on expanding sharing to TELPAK, and in particular the loss

* See the Notice, para. 31, item 10, page 18; 42 Am. Jr. Pub. Adm. Law, § 131; *Hatt v. Le Coca*, 158 F. 723 (8th Cir. 1907) and related cases.

of revenues from cross-elasticities with other services. The resulting necessity for adjustment in the rates and rate structures of the discrete wideband services could well destroy their usefulness for the users of those services whose specialized and unique needs they were originally designed to meet.

8. Shared use of these offerings to meet communications requirements for which they were not designed could in addition result in inefficient use of the facilities and in the necessity for additional construction to adapt them for the shared use. As an example, Series 7000 meets the special requirements of television customers for a one-way only transmission path, and for special switching and monitoring equipment associated with it. The service was not designed for 2-way voice or for data transmission and between many locations such usage would be impossible without the construction of additional facilities. To construct additional facilities and provide special equipment in respect to an offering designed and rated for television transmission, in order to provide 2-way voice or data transmission, is wasteful and impracticable. Permitting shared use of the discrete wideband offerings as individual channels to meet other requirements such as voice transmission would also inhibit in the future the introduction of desirable changes in technology designed to better meet the needs of the present users of the services.

9. Even if sharing of Series 7000 could somehow be devised so as to permit efficient use of Series 7000 facilities, the consequences of such sharing show that it would not be in the public interest. A range of 600-1800 one-way voice grade channels could be derived by multiplexing Series 7000 channels. Users of existing voice grade services might shift to derived Series 7000 channels, causing changes in revenue/cost relationships. Repricing of the Series 7000 offering would result in substantially greater costs to the users of television transmission, possibly even pricing them out of the market. There would also be increased prices in other AT&T service offerings, both private line and switched.

3. Changes in AT&T's Joint User
and Authorized User Provisions

10. The joint user and authorized user provisions in the AT&T tariffs, in conjunction with the tariff provisions requiring a customer to have a communications requirement of his own, requiring the communications to relate directly to the customer's business and prohibiting use for which compensation is received, inhibit a purported sharing arrangement from being a mere facade for unregulated resale of the service. Thus, authorized users can communicate only with the customer and only when the communications relate directly to the business of the

customer. Customers and joint users are billed directly by AT&T for their proportionate share of line and terminal charges. These procedures prevent a customer with minimal communications needs of its own from establishing a network of third party or authorized users who are the real users of the service. This also assures a direct relationship between AT&T and the users of its service.

11. AP, ARINC and SIAC propose that the transmission of communications between stations of authorized users be permitted, thereby allowing a customer to subscribe for services actually to be used by others. This would encourage unregulated resale and the potential for abuse associated therewith. It is noteworthy that parties who have proposed direct expansion of resale options have stated that any such resale and the reseller should be subject to regulation.

4. Extension of DATAPHONE^R Digital Service
Resale and Sharing Provisions to Other
Services

12. CNS and AP propose that use of private line service should be similar to that permitted for DATAPHONE^R Digital Service provided pursuant to AT&T Tariff F.C.C. No. 267. Whether the terms and conditions for resale and shared use of DATAPHONE Digital Service are just and reasonable is at issue in Docket No. 20288 and will not be discussed herein. It should be noted, however, that use of service provisions of any

particular service cannot be examined without also considering the technical capabilities, potential markets, user needs, rate structures and rate levels of that service. DATAPHONE Digital Service was designed with adequate consideration of the interaction of all these various factors. Haphazard extension of the use provisions in the DATAPHONE Digital Service tariffs to other services, without consideration of all these various factors, makes no more sense than random extension of DATAPHONE Digital Service rate structures to other services.

CONCLUSION

13. A number of the participants in this docket who have proposed expanded resale and sharing candidly concede that such expansion will reduce their costs of communications. The proponents, however, ignore the fact that their cost reductions will have to be paid for by other users. While the short-run economic benefit to the users who can partake of increased sharing is addressed in their Comments, the Commission should consider carefully the long-run rate and service consequences of the various proposals on the overall public.

14. No participant in this proceeding has yet come forward with any facts to justify expansion of resale and

sharing. In fact, the strongest showings that have been made support the present arrangements. No party has pointed to any specific technological advance expected to result from increased resale and sharing. The only statistical data presented support AT&T's position that expanded resale and sharing will result in substantial revenue losses that will have to be made up elsewhere.

15. AT&T's tariff provisions have been modified throughout the years where appropriate and when required to meet specific conditions justifying change (AT&T Comments, para. 72). Thus, Composite Data Service Vendor ("CDSV") resale provisions were recently filed by AT&T to encourage the application of computer and data technology to other than direct voice communications and to satisfy the needs of the so-called "value added" carriers. Even here, the CDSV carriers are not permitted to obtain TELPAK services. The decision to file the provisions resulted from extensive informal conferences between interested participants wherein it was generally concluded that the CDSVs were proposing to add a new dimension to existing communication services. The tariff requirement that CDSVs be certificated by the FCC assures all parties of an opportunity to be heard and assures that the public will be protected in their dealings with the CDSVs.

16. Other participants concur that resale should be permitted only for an augmented service. Western Union

conceives an augmented service to be a service which provides a public benefit not otherwise available with a minimum requirement of technological enhancement (para. 25). SPCC would require some beneficial effect to be shown (para. 4) while DATRAN echoes the sentiments of Packet, Telenet and Graphnet that certification should be granted only after a finding by the FCC that the service offered is augmented (para. 25). CBEMA seems to feel that resale proposals wherein basic carrier service is incorporated into a service offering by the reseller, which is different from that offered the carrier, should be permitted.*

17. AT&T respectfully submits that the Comments of the other parties in this docket clearly substantiate AT&T's statement that "The blunderbuss authorization of unlimited resale and shared use would have consequences too serious to contemplate." Changes in the resale and sharing provisions, if any, should be ordered only on a case-by-case and limited basis after full consideration of the

* The freight forwarding cases cited by CBEMA are not pertinent as authority for allowing sharing or resale of TELPAK. The freight industries' "bulk" rate for carload lots is proportionately less than the rate for partial carload lots because of the additional cost of arranging partial lots into full carloads. This cost to the railroad is saved by the service of the freight forwarders who perform the arranging functions. AT&T's TELPAK rate, on the other hand, is a competitive response rather than a cost justified discount and sharing thereof will not result in cost savings to offset the revenue losses from sharing.

-14-

proposal and its effect upon all subscribers. Any party requesting modification should come forward with facts showing public benefit to fully justify the proposed change.

Respectfully submitted,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

February 24, 1975

AppendixAbbreviation of Names of Parties
Cited in Reply Comments

AAR- Association of American Railroads
American Satellite - American Satellite Corporation
AP - Associated Press
ARINC - Aeronautical Radio, Inc.
ATA - American Trucking Association, Inc.
AT&T - American Telephone and Telegraph Company
CBEMA - Computer and Business Equipment Manufacturers
Association
CNS - Commodity News Services, Inc.
DATRAN - Data Transmission Company
Graphnet - Graphnet Systems, Inc.
GTE - GTE Service Corp.
MCI - MCI Telecommunications Corp.
NAM - National Association of Manufacturers
NATA - North American Telephone Association
Packet - Packet Communications Inc.
SIAC - Securities Industry Automation Corporation
SPCC - Southern Pacific Communications Company
Telenet - Telenet Communications Corp.
United - United Systems Service Inc.
Wells - Wells National Services Corp.
Western Union - Western Union Telegraph Company

REPLY COMMENTS OF
TELENET COMMUNICATIONS CORPORATION

Telenet Communications Corporation (Telenet), by its attorneys, submits herewith its reply comments in the above-captioned proceeding.

Preliminary Statement

This inquiry into the question of the appropriate regulatory treatment of the resale and sharing of common carrier facilities and services appears to have produced, in the initial round of comments, a general consensus as to the broad principles which should govern the Commission's future actions. Thus, there appears to be general agreement that

- (A) Sharing of communications facilities or services by several users may result in efficient use of facilities and the radio spectrum, but carries with it the risk of disguised resale.

- (B) Resale of communications services or facilities is a common carrier activity, and may be engaged in only after the reselling entity has obtained from the Commission a certificate that the public convenience would be served by the offering, and has filed an appropriate tariff;
- (C) Generally, the Commission should continue its "open entry" policy as to the certification of resale entities, but should, in that certification process, examine each proposal to determine whether "value" is truly added by the applicant, or whether only brokerage or arbitrage is involved.
- (D) Competition expected to develop in the value-added carrier field will obviate the need for detailed regulation of the type which has developed for the protection of the public vis-a-vis the monopoly carriers.

Telenet's original Comments espoused the foregoing viewpoints, and it is pleased that most commenting parties--both carriers and users--are in general accord on the principles governing these subjects. That some commenting parties experienced difficulty in applying these principles to particular factual situations is not surprising. The Commission, with its broader perspective, should not be similarly troubled.

Several examples of the collision between principle and pragmatism illustrate the foregoing point:

- A) RCA Global Communications Inc. agrees generally that resale is a common carrier service, and should be fully regulated, whereas sharing

is not a common carrier activity. RCA points to its own RCA Joint Users Service as a "typical shared-use arrangement" which it believes is "fundamentally different from resale", and "does not constitute a common carrier activity". RCA does agree that it would be appropriate for the Commission "to require only that sufficient descriptive information be filed with the Commission for each shared-use arrangement to permit the Commission to monitor this type of service in order to ensure that it is in fact a shared-use arrangement and not a common carrier service engaged in for profit." (Comments, para. 8-10, emphasis added). In its exuberance, RCA has seemingly overlooked the fact that "profit" is among its own objectives in offering its Joint User Service, as established by its own literature; see Telenet's Comments, Attachment E, p. 56 ("The network management fee, ... covers RCA costs and profits,...").

B) AT&T, in its Comments, predicts in some detail the drastic effects of unlimited sharing and unregulated resale of its services and facilities. Yet, at page v of its Appendix, it asserts that

"Regulation of sharing agreements under existing tariffs is not necessary. Any further sharing should not be authorized other than indicated in paragraph 73 [where AT&T states its willingness to modify its tariffs to accomodate the addition of 'new dimensions to existing communication services.'].".

AT&T has made no attempt to explain how several existing sharing arrangements entered into by its customers with its acquiescence are consistent with the tariff proscriptions against resale. The comments of MCI and of Western Union, as well as Telenet's, have pointed to several of the more blatant cases of unlawful resale posed as sharing. So long as AT&T ignores the problems posed by its refusal to enforce its own tariffs, the case for Commission oversight of sharing arrangements is even more compelling.

In its initial comments, Telenet did not address the single-customer issue raised in Questions 9 and 10 of the Notice of Inquiry, preferring to first review the comments filed by those directly involved in the issue. Those comments indicate that the single-customer issue is very closely related to the broader issues of resale and sharing, and that resolution of the single-customer question should not be attempted without full consideration of this relationship. We will discuss this below. In addition, two international record carriers have suggested that a different set of policies regarding resale should pertain to international communications: This subject, too, will be addressed below.

The Single-Customer Question

The parties commenting on the single-customer issue can be broadly divided into two groups: The "haves", i.e., Aeronautical Radio, Inc. (ARINC) and the Securities Industry Automation (SIAC), and the "have-nots"--the American Trucking Associations (ATA), the National Association of Motor Bus Owners (NAMBO), the Association of American Railroads (AAR), and the National Retail Merchants Association (NRMA). The carriers whose tariffs are directly involved have either remained silent (Western Union) or have merely stated the purpose of each single-customer exception, without any attempt at rational justification in the context of the resale and sharing issues (AT&T). Neither Western Union nor AT&T addresses itself to the allegation of the American Trucking Associations that the exceptional treatment accorded ARINC in AT&T's Private Line Tariff is an unlawful discrimination against competing modes of transportation, which precipitated the proceeding from which this Inquiry grew.

For its part, ARINC contends that any discrimination involved in its treatment as a "single customer" is "reasonable", and that, in any event, its status as a "customer" derives from Section 201 of the Communications Act, and not from Section 2.2.1 of the Private Line Tariffs of AT&T and Western Union. Before examining ARINC's arguments in detail, the comments of the other industry associations merit attention. In the main, these associations view the ARINC treatment as an unlawful discrimination which can be conveniently eliminated through expansion of the single customer provisions of the AT&T and Western Union tariffs. Several associations admit that an unlimited expansion of the single customer provision would be tantamount to permitting unlimited resale and sharing,^{1/} and have sought to draft proposed tariff modifications in a Procrustean fashion--neatly fitting the association in question, but avoiding a stampede of new "single customers." Other associations were less inhibited. For example:

(A) NAMBO would extend the ARINC exception to the "entire transportation industry" (page 10).

(B) ATA would extend the single customer benefits to "any association of federal or state government regulated public utilities whose members must secure governmental business entry approval on certification as a prerequisite to lawful operation...", including, of course, trucking companies (page 22).

(C) AAR favors sharing (presumably through the "single customer" device) by "entities now authorized to share microwave facilities under

^{1/} As ATA puts it (paragraph 29), "the device of defining a group as a single customer has the effect of merging the issues of resale, third party use, and joint users..."

Parts 91 and 93 of the FCC Rules" (page 3). Parts 91 and 93, governing Industrial and Land Transportation services, respectively, permit sharing on a non-profit basis by persons eligible to be licensees in the same radio service. In addition to a number of particularized services recognized by the rules ("Power Radio Service", "Petroleum Radio Service", "Motion Picture Radio Service", and "Relay Press Radio Service"), a general "Business Radio Service" is open, inter alia, to "any person engaged in a commercial activity" (§91.551(a)). Thus, while AAR claims that it is "not proposing wide-open unlimited sharing between non-alike entities on a for-profit basis" (Ibid), it is clear that it is proposing wide-open unlimited sharing by like entities on an assertedly non-profit basis.

D. NRMA straight-forwardly urges the Commission to "actively encourage the formation of communications users associations," which would engage in "unregulated", "non-profit", single-customer sharing (pages 3-4). NRMA would not restrict such associations to industry affinity groupings, but would permit such user groups to be "formed and operated by totally unrelated and disparate industry members" (page 7). (Not surprisingly, NRMA also supports the establishment of regulated, for-profit, arbitragers which would offer the ultimate user no added value of a physical nature but only a lower price.)

All of these commenting associations have one common and valid point: To permit one industry or user-group to obtain the economic benefits of unlimited sharing or unregulated resale through the device of the single-customer exception, which denying such benefits to other industries or user groups, is an unreasonable discrimination. However, it is extremely unlikely

that all private line users will find that their communications needs can be met by a "user group" middleman, and thus discrimination will continue to exist--though with a different boundary--if the "single-customer" concept is further expanded.

Moreover, none of these associations is apparently able to foresee the inevitable long-range effects of its proposed "solution": The ultimate elimination of Telpak and other forms of volume discount for communication channels. While the elimination of Telpak may or may not be in the public interest, that question should be resolved on the merits of Telpak, and not indirectly.

The associations allege or imply that so long as a user group is "not-for-profit", no resale of communications occurs. This is a patent non-sequitur, for many non-profit associations conduct profitable business ventures and devote the profits to their other non-remunerative activities. Moreover, whether an entity is providing a common carrier service does not depend on whether the service is offered for "profit" but only whether it is offered "for hire"; see Section 3(h) of the Communications Act.

Telenet's concern with the single-customer exceptions and their possible expansion should not be construed as representing a blanket condemnation of the existing single-customer entities, ARINC and SIAC, or of their activities. In part, at least, each of these companies is providing a needed service to its industry, and thereby to the public. That societal judgment should not, however, blind the Commission to the fact that in performing some of these services, ARINC and SIAC are effectively engaged in unregulated common carriage, undercutting the Commission's freedom to deal rationally with resale and sharing generally, and in disregard of

existing rules and policies; e.g., Section .64.702 of the Rules and the policies established in the Computer Inquiry (Docket No. 16979; 28 FCC 2d 267).

Examination of ARINC's activities should illustrate the problem. In order to place that examination in context, it is useful to recall that ARINC's status as a customer in its own right was established in Aeronautical Radio, Inc. v. AT&T Co., 4 FCC 155 (1937), on the basis of a finding by the Commission that its intended use of AT&T-provided private lines involved "safety of life and property in the air" (Id. at 162). In view of the substantial changes in both communications and aeronautics in the intervening thirty-eight years, it would seem that the time is overripe for the Commission to re-examine the factual predicate for its 1937 ARINC decision and to determine whether all of the communications activities of ARINC today represent logical and anticipated developments from that decision.

While ARINC's Comments create the appearance of a full and detailed description of a unitary network totally dedicated to the interrelated communications needs of the air transportation industry, further examination would reveal that, in large measure, ARINC is merely performing an arbitrage function--buying private lines at bulk Telpak rates, and reselling such channels to the air carriers for their respective internal communications needs.^{2/} This is not to say that all of ARINC's activities are in the nature

^{2/} ARINC claims at pp. 60-61 that rate questions are beyond the scope of this proceeding--that "it would turn this proceeding into a meaningless disembodied quarrel if an attempt were made to equate 'customer status' with special rate treatment" (emphasis in original). Its reluctance to address the bulk rate and resale questions here--though understandable--should not deter the Commission from considering all relevant questions bearing on the public interest.

of brokerage. It is obvious that its operation of air-ground radio stations and of the "weather wire" are consistent with the original raison d'etre of ARINC, and that certain private line facilities are required by ARINC in the rendition of those services. Beyond, that, however, ARINC is performing two essentially common carrier functions: switching of messages for air carriers,^{3/} and brokering of dedicated private line networks (derived from its Telpak channels) to individual air carriers for their internal communications needs.

^{3/} While ARINC's role as a provider of message-switching service is somewhat tangential to the main thrust of this proceeding, consideration of that activity may be useful in order to place the company into proper overall context for regulatory purposes.

It is Telenet's view that provision by ARINC of store-and-forward message switching service to the airlines, using extensive computer facilities (its Electronic Switching System, or ESS), may be beyond the intended scope of the Commission's 1937 Decision. This is not to say that ARINC should not operate its ESS, which provides a valuable unique "value added" service to the airlines, but rather to question the appropriate regulatory treatment of such activity. ARINC's message-switching service is conceptually similar to computer-based message-switching systems and services found in other industries (e.g., Western Union's tariffed SICOM service, which serves the securities industry), and as such would appear to be subject to the guidelines established by the Commission in the Computer Inquiry, *supra*. The ARINC ESS is unquestionably a pure or a hybrid communications service, and is offered to the airlines on a for-hire basis. Accordingly, under the Commission's Rules, it would be appropriate for ARINC to offer this service as a common carrier undertaking--and, if it wishes, to provide a complete "package" service including the necessary private lines to and from the switching centers. Provision of this service by ARINC on a common-carrier basis would not detract from the company's concern for the "safety of life and property in the air," would rectify the discriminatory application of the Rules which results from the present non-carrier treatment of this service, and would extend the benefits of this service to non-aviation organizations who have a need to communicate with the aviation industry.

ARINC's status as a customer for the purpose of acquiring the lines necessary to the effective operation of its air-ground radio stations and its "weather wire" appears to fall well within the intended scope of the Commission's 1937 Decision, and involves no "discrimination", unlawful or otherwise. However, the company's arbitrage of private-line facilities to obtain bulk rates for the airlines is another situation altogether. Such arbitrage or brokerage activity adds no value to the lines which ARINC leases from a communications carrier, and it fills no operational needs of the airlines which could not be met by each airline dealing directly with the communications carriers. It is totally unrelated to the safety of life and property in the air, and its importance to the airlines is purely economic in nature.

The Commission should carefully consider whether it is in the public interest for ARINC (or any other organization) to lease channels at bulk Telpak rates and resell such channels, with no "value" added, to the members of a particular industry or to any other group of users. In the unlikely event that the Commission concludes that such pure line brokerage is desirable, it should--as virtually all the respondents to this proceeding agree--require that all firms engaging in such resale first become certificated as common carriers. Thus, if ARINC were to be permitted to continue this activity at all, it should be required to submit to regulation as a carrier, and thenceforth to offer its "resold" private lines to all comers, not just to the airlines.

In its 1937 Decision, the Commission noted ARINC's intention to use its private lines for airline reservation services, and found this to be safety-related because a "temptation to take off with an overload or to drop

fuel to avoid an overload often follows if sufficient advance notice is not given as to reservations [and that s]uch temptation constitutes a danger to the safety of life and property in the air" (4 FCC at 162).

It is submitted that such a "temptation" does not exist today: Improvements in equipment and scheduling, and the enactment of Federal safety standards^{4/} have eliminated any possible "temptation". Moreover, it is inconceivable that the airlines would cease to make full use of their sophisticated computer-based reservation systems if they were required to obtain the private-line circuits needed for these systems directly from a communications carrier, rather than through ARINC. Computer reservation systems are an accepted fact of life in virtually every other industry which needs this sort of information, such as hotels, rental cars, passenger railroads, theatres and sports arenas, and the like, even though those other industries lack the single-customer advantages afforded to the airlines. The question today regarding the airline reservations systems is simply one of economics, of whether the airlines should pay as much as other users for the lines needed for their systems.

It should also be noted that, whereas in 1937 there was no apparent cost advantage to the airlines for ARINC to lease private lines for their use, since the advent of Telpak in 1961 a significant savings--estimated by ARINC at \$40 million annually--is realized by the airlines who obtain through ARINC voice grade lines at a fraction of the cost of similar lines to other customers of AT&T's Private Line service. And it is this fact which renders the current treatment of ARINC an unreasonable discrimination--not just against

^{4/} The Civil Aeronautics Administration was created in 1938, one year after the Commission's ARINC decision, and was replaced by the F.A.A. in 1958.

other competing modes of transportation, but against the users of private line services generally, who, if an additional \$40 million of revenues were realized by AT&T for airline services, might be the beneficiaries of a general reduction in private line rates.^{5/}

In designating for hearing the ATA complaint, the Commission stated:

"[O]ur actual holding in 1937 was that ARINC could obtain private line services from AT&T for ARINC itself to transmit messages relating to safety of life and property in which ARINC had a direct interest even though such transmissions were to be for the benefit of the airlines. However, the issue raised by the ATA complaint is whether ARINC may obtain private line services not only for its own use but also for the use of the airlines themselves and obtain for itself and the airlines all of the privileges allowed by the tariff exceptions referred to above, which privileges are denied to the competitors of the airlines who claim that they also have a need to transmit communications which relate to safety of life and property. Furthermore, the changes that have occurred in ARINC's operations since 1937 raise questions as to whether and to what extent our decision in 1937 has applicability to present-day facts and circumstances." 41 FCC 2d 2, at 5 (1973).

The foregoing demonstrates that "present-day facts and circumstances" are far different than those in 1937, as are ARINC's operations. Discrimination exists, in that ARINC is permitted to broker AT&T lines to air carriers who thereby receive communications services at a substantially lower price than direct customers of AT&T for like services. That discrimination will not disappear, but will be aggravated if the exceptional treatment accorded ARINC is expanded to include all transportation companies, all regulated

^{5/} It is unfortunate that none of the commenting parties herein represents the general non-Telpak private line users, other than in the form of an "association" seeking advantages similar to those enjoyed by ARINC. As noted above, such advantages--even if unlawful--would be of only limited duration, for the economics of such sharing-resale of Telpak would force up the Telpak rates, if not destroy Telpak as a service.

industries, all affinity-industry groups, or even all ad hoc user groups. The only means of eliminating that discrimination is to rule that ARINC may not engage in line brokerage unless it first obtains common carrier certification.^{6/}

International Resale Should be Governed by
the Same Rules as Domestic Resale

In the initial round of comments, two respondents, RCA Global Communications, Inc. and ITT World Communications Inc., discussed the subject of resale and shared use in the international arena as well as within the domestic United States. Both organizations are in agreement with Telenet that resale is a common carrier activity subject to regulation by the Commission, and RCA agrees with Telenet that shared use (joint use) of domestic communications facilities should be permitted on an unregulated basis subject to certain restrictions; ITT recommends that joint use be treated as a common carrier activity subject to regulation. However, both RCA and ITT argue that, whatever policies the Commission might adopt regarding the sharing and resale of domestic facilities, the international arena is so distinctly different that the current prohibitions against sharing or resale of international circuits should be retained.

These arguments are grounded on the contention that (1) the CCITT Recommendations are opposed to any customer of an international carrier engaging in sharing with others, or in any activities which might be construed

^{6/} To determine whether SIAC's operations are similarly flawed, more facts than are contained in its initial Comments are necessary. Though SIAC appears to be buying bulk Telpak and selling derived circuits to member firms for their own inter-office communications, and to be operating a message switch like ARINC's ESS, its Comments are less than clear on these points. In the event that SIAC fails to particularize its activities in this or the final round of comments, the Commission is urged to make specific inquiry into the matter in Phase II of this proceeding.

as competing with an Administration in providing public telecommunications service, and (2) the overseas telecommunications entities (the PTTs) generally follow those Recommendations. In light of the fact that the offering of international service requires coordination with the overseas entities, it is argued the Commission should forego any unilateral development of policy in this area.

However valid such an argument may be with regard to sharing-- which involves the use by a customer of facilities furnished by an overseas administration--it simply does not apply to resale. Once it is agreed that resale is a common carrier activity, it becomes apparent that a U.S.-based entity seeking to provide a resale-based international service is not likely to be a customer of an overseas telecommunications administration but rather would be a partner with such administration in providing service to the public. The existing U.S. international record carriers operate in such a fashion, and do so in substantial measure through the vehicle of resale: they lease half-circuits from Comsat, a "carrier's carrier", and resell to the public either the circuits themselves or switched service which makes use of the circuits. And, of course, they must coordinate such service offerings with their overseas counterparts. There is no reason, in principle, why the Commission should not certificate additional firms to lease international facilities and offer common-carrier service to the public, assuming that two criteria are met: (a) That the proposed service meets the public convenience and necessity criterion of Section 214 of the Act, and (b) That the applicant has negotiated the necessary operating agreements with appropriate overseas entities.

It is most likely that each of these two criteria will be satisfied where the proposed service is truly new and innovative, and meets discernable public needs which conventional international services leave unsatisfied. And if the proposed service is, in effect, an extension of network services being offered on a domestic basis in the countries involved, and would permit efficient interconnection of those domestic networks, it is particularly easy to satisfy those criteria. Thus, Telenet believes that international packet-switching service will be a logical candidate for certification by the Commission in the foreseeable future. Packet-switching networks are being built by Telenet in the U.S., by the Trans-Canada Telephone System in Canada, and by the British Post Office in the U.K. The Spanish PTT operates a packet network at the present time, the French PTT is planning to establish such a network, and other countries are in various stages of similar study and planning. In the U.S., Comsat has recently filed a Section 214 application for authority to install and operate packet-switching equipment which would initially provide service between the U.S. and the U.K. in support of the Defense Department's ARPANET--the research packet network, developed by Telenet's parent company, which originated the technology used by Telenet.^{7/} In a relatively short period of time, it will be desirable to interconnect these various domestic networks by means of international packet-switching facilities, to afford international computer-communications users the same economies and operational benefits which they will receive in their domestic data communications.

Such interconnection might be effected by one or more of the existing international record carriers (IRCs) and/or by one or more entities which

^{7/} File No. _____, dated February 5, 1975.

do not presently hold such international certification, such as the domestic value-added carriers--acting either independently or in cooperation with an IRC. Just as the Commission has determined that open entry and competition among domestic value-added carriers are in the public interest, so, too, the international extension of such services on a competitive open-entry basis will be in the public interest. Approval of specific service proposals, of course, must be on an ad hoc basis, but the Commission should in the instant proceeding state as a matter of general policy that international as well as domestic resale will be governed by the same rules: that it is subject to regulation and that an open-entry policy will prevail for those service proposals which offer genuine benefit to the using public. Such a policy will stimulate the international expansion of innovative new domestic data communications services, as well as the development of innovative new services of a purely international nature--helping to bring to the international arena the same benefits of competition which are expected to result at home from the Commission's specialized carrier, domestic satellite, and value-added carrier decisions.

Respectfully submitted,

TELENET COMMUNICATIONS CORPORATION

February 24, 1975

REPLY COMMENTS OF
AMERICAN TRUCKING ASSOCIATIONS, INC.

<u>INDEX</u>	<u>PAGE</u>
I. PRELIMINARY COMMENTS	3
II. DEFINITIONS CLARIFIED	4
(a) Resale	4
(b) Joint or Shared Use.	4
(c) Pocket Common Carriers	4
(d) Single Customers	5
(e) Business Services Involving Communications	5
(f) Value Added Carriers	6
III. FULL USE OF COMMON CARRIER PLANT	6
IV. SUPERVISION OF USER SHARING AND RESALE	7
(a) Present Status	7
(b) Carrier Responsibilities	8

(c) Public Abuses Beyond Carrier Control	9
(d) Commission Responsibilities	10
V. SINGLE CUSTOMER SUPERVISION	13
(a) Present Status	13
(b) Carrier Responsibilities	14
(c) Absolute Carrier Control	15
(d) Commission Responsibilities	15
VI. RESALE BY OTHER COMMON CARRIERS	16
(a) General Common Carriers (GCCs)	16
(b) Radio Common Carriers (RCCs)	16
(c) Specialized Common Carriers (SCCs)	17
(d) Packet Common Carriers (PCCs)	18
(e) Limited Common Carriers (LCCs)	19
VII. CONCLUSION AND PRAYER	20

I. PRELIMINARY COMMENTS

1. This important Inquiry has resulted in the filing of a large number of Comments by a cross section of certificated common carriers and by "bulk communications services" users.^{1/} The difficulties involved in operating, regulating or using common carrier communications services in large volume are well demonstrated by the diverse Comments which have been filed. Justification for the initial position of ATA on behalf of trucking industry communications users that "single customer" status equal to that afforded to ARINC should be extended to ATA is apparent in the Comments of other major participants in this matter who have special knowledge of relevant facts:

- (a) Removal of all regulatory restraints against resale and sharing likely would destroy the availability of bulk use services which benefit the public. (Comments of AT&T, GTE and WU)
- (b) The level of public service now given by the nation's airlines would be impossible, particularly for small airlines, were it not for ARINC's industry-wide communications system which depends for its viability upon single customer status. (Comments of ARINC, ATAA)
- (c) Single customer use of lower-cost bulk communications has facilitated "revolutionary" improvements in all aspects of the air transportation industry's performance. (Comments of ATAA)
- (d) AT&T has not yet extended single customer status to ATA to permit the trucking industry which competes with the airline industry to achieve revolutionary improvements in its level of public service but is willing to "add new dimensions" to its tariffs to satisfy user problems as they arise. (Comment of AT&T)

^{1/} A list of Comments analyzed by ATA and the abbreviations used herein to identify the individual Comments is shown at Appendix A.

2. AT&T and interested users have justified the principles of joint and single customer use and the prohibitions against resale unauthorized by the Commission, but it is clear that some practical non-structural changes in tariffs and some Rule Making by the Commission is needed to eliminate certain present carrier discriminations and user abuses.

II. DEFINITIONS CLARIFIED

3. Study of the terms used and of the attitudes of the various parties that have filed Comments shows that definitions and concepts not now universally understood or accepted must be clarified.

(a) Resale. True resale of communication services occurs when a primary joint use customer provides and bills communication services, or use of communication facilities, to other users who control their own message content and who pay anything more than a strict proportion of common carrier tariff rates for the amount of use not accounted for by the primary customer's own communications needs.

(b) Joint or Shared Use. True joint use of services occurs only when all users are direct customers of the common carrier paying their bills directly to the common carrier at tariffed rates, with no management fee of any kind being paid to the primary customer by the sharing users.

(c) Packet Carriers. The business services described by GS, PS and TCC are new communications services. They are new primary

communications services which differ from any primary services previously offered by AT&T, WU or any other General Common Carrier (GCC). ^{2/} Radio Common Carriers (RCCs) and Specialized Common Carriers (SCCs) have now been joined officially by Packet Common Carriers (PCCs) as recent new classes of public utilities. ATA herein suggests that still another class of common carrier, the Limited Common Carrier (LCC) will have to be recognized, if "resale" and "joint use" problems are to be worked out fairly to carriers and users.

(d) Single Customers. Defining the operator of a communications system for an industry affiliated group together with the members of the group as a "single customer" removes members of that group from any further consideration as to whether they are sharing with or reselling to other members of the same group. Thus, while future policies and practices with respect to authorizing single customer status are of great importance and must be clarified in these proceedings, such considerations do not relate per se to sharing and resale regulation problems, which by definition can be problems only between multiple users.

(e) Business Services Involving Communications. The business services described by such participants as AFSI, BRC, AP, CNS, DJ, SIAC and XF make heavy use of common carrier communications services. However, such organizations are in business themselves to provide fundamental non-communications services. Rapid communications are necessary

^{2/} Western Union describes GCCs as "established carriers." ATA suggests a GCC is a common carrier that provides several "established" services, including either message telephone or message telegraph service.

for the successful accomplishment of the businesses of these organizations, but they are not carriers under any equitable definition which assumes the applicability of any current type of carrier regulation, because primarily they use rather than resell communications. Their communications are, in AT&T tariff terms, "to or from the customer" and are "directly related" to the customer's business.

(f) Value Added Carriers. This term assumes a "carrier" status as a threshold matter. But inasmuch as every common carrier service, to be viable, must add value for the carrier's customer, the term "value added carrier" tends to confuse rather than to help define or solve problems. ATA suggests that there should be no further reference to "Value Added Carriers." Particular organizations are either common carriers or they are not common carriers; they may be GCCs, RCCs, SCCs, PCCs or some other class of common carrier. The list of definitions now useful will grow, just as the list of frequency band designations had to grow to define radio bands higher than "ultra high frequency."

III. FULL USE OF COMMON CARRIER PLANT

4. Some Comments suggested that, in the interests of resources conservation, tariff changes should be made which will result in heavier use of existing GCC channels -- through sharing. See, for example, Comment of SIAC, page 40. This concept disregards the engineering facts of life, which are that telephone plant is not designed for "full use" but merely for statistically probable "average peak use." Radio, carrier and switching systems have been designed only to handle the average peak

composite use of many channels, each channel having certain anticipated idle time. As a generality, any shift in use characteristics which significantly reduces idle time in circuit groups will require reduction in the number of channels incorporated into the groups. Only the necessary margins of safety needed to assure the proper performance of the telephone network has been reserved in the design of the network's common equipment.

5. Just as the revenues lost from unlimited sharing or resale would have to be made up by the carriers elsewhere, to maintain adequate earnings, so plant capacity to handle heavier average channel use would have to be made up elsewhere -- by construction of additional channels -- to maintain adequate carrier capacity.

IV. SUPERVISION OF USER SHARING AND RESALE

(a) Present Status

6. In view of the general tariff requirements that communications must be to or from the customer and that the customer must have a direct interest in each use of a communication service, authorization for any joint use of service must originate in carrier tariffs. AT&T's provisions for private line joint use are contained in AT&T Tariff F.C.C. No. 260, paragraphs 2.5 and 3.1.5, permitting joint use of some types of services, with each of the secondary joint users being considered a direct common carrier customer and being billed for its service directly by the common carrier according to proration-of-charges

information supplied to the common carrier by the primary joint user. Such joint use has proved to be extremely valuable to many important user groups. For example, see the Comments of ARINC, ANPA, AP, CIT, CNS, DJ, NAM, SIAC and TCC. Joint use always involves payment of extra charges to the carrier, which charges are considered to be unreasonably high by some common carrier customers. For example, see the Comments of AFSI, AP and CNA. Joint use is limited to relatively narrow band channels, which limitation is considered to be unreasonable by some common carrier customers. See Comments of AIR, CBEMA and DJ. Neither common carrier tariffs nor Commission Rules and Regulations prohibit the primary joint user from charging its secondary joint users a management fee and a profit. It appears that present joint use tariff provisions encourage or at least permit the creation of shared use networks which return profits to the primary user. See the Comments of TELENET. If the definitions of "Resale" and "Joint or Shared Use" proposed by ATA at II.3.(a) and (b) above are legally correct, and ATA believes they are, it is clear that primary joint users are, in many cases, reselling communications services without proper authority to do so.

(b) Carrier Responsibilities

7. It is the proper responsibility of the common carrier to establish in its tariffs rates and regulations which will permit joint use at fair and reasonable rates and under reasonable conditions, if such a service is to be offered at all. Comments filed herein by users fully substantiate public need for joint use services. ATA does not

feel that sufficient information has been revealed in the Comments so far filed to determine whether the premiums charged by AT&T for joint use are fair and resonable. AT&T should be required, under Commission scrutiny, to justify its joint use rate structure. ATA believes that it is clearly unfair and unreasonable to limit sharing to narrow band channels, and suggests that AT&T does so primarily in an effort to limit unlawful sharing abuses. However, as is later shown, it is not the responsibility of AT&T to enforce the Communications Act. AT&T should be required to extend its joint use provisions so as to include all types of private line channels.

8. Just as it would be inappropriate to require a carrier to inquire into the financial arrangements which exist between joint users in order to enforce the provisions of Section 214 of the Communications Act, it is also inappropriate for the Commission to permit AT&T to limit joint use of narrow band channels as a device to reduce the temptation to primary joint users to sub-divide wide band channels for resale at a profit. This is unreasonable discrimination against users who need wider band channels and could benefit from proper sharing as defined in II.3.(b) above.

(c) Public Abuses Beyond Carrier Control

9. Comments filed in this matter allege that certain primary joint users, for example RCA and TYMNET engage in reselling communications service to others for profit without regulatory authority. It is clear from the definitions at II.3.(a) and (b) and from the Comments of

many parties that such actions are improper. However, the potential and incentive for abuse of joint use arrangements under existing tariffs is such that abuses will not disappear without some new Section 214 enforcement actions. But abuses cannot be controlled by a GCC whose services are being jointly used improperly.

(d) Commission Responsibilities

10. Joint use arrangements have been fully justified, in the public interest, and it is an obligation of the Commission to so regulate the service offerings of GCCs and SCCs that users may continue to benefit from properly regulated joint use. It is legally quite clear that when a primary joint user engages in resale of communications, as defined above at II.3.(a), the primary user does, in fact, become a common carrier if his actions are viewed strictly according to the terms of the Communications Act. This does not mean that such practices need be prohibited, but rather that such practices should be permitted only after the Commission finds in individual cases that such practices satisfy public convenience and necessity.

11. ATA suggests that there already exists, and that there is a need for official recognition of, an additional new class of common carriers, who could be known as Limited Common Carriers (LCCs), to provide a vehicle for the Commission to authorize resale of communications services by authorized primary joint users, when such actions satisfy public convenience and necessity as in the cases of AP and DJ and others. The Commission could adopt rules and regulations, including

application forms similar in simplicity to the application for a Restricted Radiotelephone Operator License, to permit appropriately simplified processing of requests to become an LCC. For example, the Commission's Rules should provide that a primary joint user of common carrier communications service may make no charges whatsoever to secondary joint users unless the primary joint user is certificated as an LCC. The rules could provide that certification as an LCC would occur automatically, at the end of a short waiting period, say, 30 days, after an application for a certificate had been filed with the Commission. The prospective LCC would be required to reveal the substance of the sharing arrangements, including particularly the need, charges, conditions and industry and financial relationships of all joint users. The Commission's Rules could provide that a copy of such applications with attachments would be required to be served at the time of filing on a GCC-SCC industry committee or on the locally franchised GCCs and SCCs. This would permit protests to be made on behalf of GCCs and SCCs, if the proposed arrangements between the primary and secondary joint users do not comply with pre-established Commission Rules guidelines, in the opinion of the GCCs. Commission or Commission staff specific actions would be required only in cases involving protested applications. Periodic reports, in the absence of complaints, would not be necessary. Where LCCs chose to go beyond the limits of their authority, GCCs and SCCs, or competitors of the LCC would call the transgressions to the Commission's attention, as they do now.

12. The Commission's Rules should establish limits concerning the maximum scope of LCCs' operations which could be automatically certificated, structured as "trip lines" in accordance with the plan suggested for sharing arrangements in the Comments of TELENET, at pages 23-24. ATA does not suggest that the particular limits or conditions proposed by TELENET are those which should be adopted by the Commission, but does propose that general scope-limiting procedures as envisioned by TELENET and suggested to be applied to 214 applications herein would be an appropriate method of accomplishing registration and automatic simplified certification of LCCs who intend to operate within such limits as the Commission could pre-establish as satisfying the public convenience and necessity.

13. In summary, there exists a truly fundamental problem with respect to sharing versus resale which cannot be controlled by the common carriers themselves, if sharing is to be permitted in some, but not all, situations. Some sharing is very clearly in the public interest. A proposal for unlimited joint use or sharing is simplistic and possibly unlawful. (AT&T v. FCC, 449 F. 2d 439; 22 RR 2d 2069) Moreover, such a requirement by the Commission likely would destroy the very services which can be shared. The only apparent solution to this dilemma is Commission supervision of joint use, to permit such use to continue in proper cases and to be suppressed in other cases.

V. SINGLE CUSTOMER SUPERVISION

(a) Present status

14. AT&T Tariff F.C.C. No. 259, 260 and 263 all contain provisions which limit use of services to "the customer." For this reason recognition of a group of users as a "single customer" is an important step which makes possible the operation of a centrally managed integrated industry-wide system such as that described by ATAA and ARINC. Such an industry-wide system would produce "revolutionary" opportunities to improve trucking industry performance, just as it facilitated better airline service to the public than otherwise would have been possible.

15. It is clear both legally and historically that treatment of ARINC and the airline industry it serves as a single customer is proper and is beneficial in the public interest. (Comments of ARINC and ATAA) But failure to provide similar treatment to ATA and the trucking industry it serves raises obvious questions of unfair and unreasonable discrimination. (Comments of ATA) The record herein certainly would not justify any Commission-ordered tariff changes to rescind the single customer treatment afforded to the electrical power industry, the United States Postal Service, the air transportation industry or the other groups so treated. The problem facing the Commission is one of eliminating cases of unreasonable discrimination without injuring user groups already treated as single customers, and also without seriously injuring carriers or their other customers.

16. ATA first suggested revision of AT&T Tariff F.C.C.

No. 260, paragraph 2.2 to language which would broaden the groups to be treated as single customers on an non-discriminatory basis.

(Comments of ATA, pages 20-23) AT&T in its Comments has suggested that it should continue to expand user privileges on an ad hoc basis indicating that AT&T is willing to add new dimensions to its tariffs as they appear to be justified. (Comments of AT&T, pages 3 and 38)

ATA believes that the categories it suggested at pages 20-23 of its initial Comments are reasonable and could properly be adopted by AT&T or by the Commission in a directive to AT&T. However, ATA also believes that AT&T's suggestion of continued orderly expansion of user privileges on an ad hoc basis is a satisfactory, reasonable, as well as an historic alternative approach. But it seems apparent that some Commission guidance to AT&T with respect to its ad hoc additions to the single customer group at this time is indicated inasmuch as AT&T has neglected to revise its tariffs to recognize ATA and the trucking industry units as a single customer and this Docket results from ATA's Complaint against AT&T. The Commission will recall that Judge Mansfield suggested that ATA's redress was at the Commission, in his decision in National Association of Bus Owners and American Trucking Association vs. AT&T et al., 460 F. 2nd 561; 24 RR 2d 2052, at 2059. (2nd Cir. 1972)

(b) Carrier Responsibilities

17. It is the responsibility of the common carrier to establish in its tariffs conditions of service which are just and reasonable.

Under the circumstances which have been revealed by the Comments of ATA, ATAA and ARINC herein, it seems apparent that AT&T now has a responsibility to revise its tariffs so as to treat ATA and the trucking industry which it serves as a single customer, paralleling similar treatment afforded to ARINC and the airline industry which it serves.

(c) Absolute Carrier Control

18. It has been shown above that, with respect to user sharing and resale between multiple customers, the common carrier has neither the right nor the ability to prevent abuses, which creates a policing problem for the Commission. Such a situation does not exist with respect to the use of services by a single customer. The carrier has adequate control over single customer use provisions. After an initial decision has been made to treat a particular group as a single customer, sharing and resale problems within the group cannot exist.

(d) Commission Responsibilities

19. The Commission is required by Section 205(a) of the Act so to regulate the conditions of service of common carriers that unjust or unreasonable discrimination by common carriers between users does not exist. It is apparent from an understanding of the revolutionary improvements which the operation of a centralized transportation industry communication system makes possible, as described by ATAA and ARINC, that the trucking industry, a competitor to the airline industry, is presently subject to unjust and unreasonable discrimination by being

denied an opportunity to establish a similar industry-wide communications and control network, as a single customer, through use of AT&T facilities.

VI. RESALE BY OTHER COMMON CARRIERS

(a) General Common Carriers (GCCs)

20. GCCs regularly engage in resale of the services of other GCCs through joining together, in providing through service regulated by tariff, as participating or connecting carriers. Of course GCCs should be and are permitted to resell the services of other GCCs under proper tariffs. No one has suggested that the provisions in AT&T's tariffs justified to limit resale by users apply to other units of the GCC industry.

(b) Radio Common Carriers (RCCs)

21. RCCs generally are provided services or facilities by GCCs under contracts which permit "resale" of the GCC service by the RCCs. As a generality, the rates and charges applied by GCCs for services furnished to RCCs under contract are the same as the rates and charges which apply for users in the GCC's tariffs. In many if not most cases, the only reason for a GCC to provide services to an RCC under contract is to avoid the tariff restrictions against resale which should not be applied to service resold by another regulated common carrier. It would be much more appropriate, and would simplify operations, if all common carriers were treated as other GCCs are treated, which could

be done if GCC tariffs were to provide that the various restrictions concerning resale do not apply to other common carriers of any now existing class, so long as tariffs covering the services of the other carrier are on file at the appropriate regulatory commission.

(c) Specialized Common Carriers (SCCs)

22. Services to Specialized Common Carriers for resale are provided for under tariffs. SCCs and their customers have nevertheless experienced great difficulties in securing the services they need from GCCs because of a tendency on the part of GCC employees to apply to SCCs the provisions against resale contained in AT&T basic tariffs, F.C.C. Nos. 259, 260 and 263, which are designed to prevent resale by end users. GCC local personnel could better understand the true relationship between common carriers of different classes if AT&T basic tariffs, FCC Nos. 259, 260 and 263, made it clear internally that the "use" provisions do not apply to other common carriers using GCC services in rendering their tariffed services. The constant flow of complaints against GCCs to the FCC by other carriers or their customers, sometimes appearing to be interconnection complaints, should be reduced if the GCCs were to revise their end user tariffs to make it clear that the GCC services may be used by other classes of common carriers without regard to direct interest in message content, or whether the communication is to or from the customer. AT&T should be required to provide in their basic tariffs, in simple enough language so it would be understood by GCC employees, that the various restrictions designed to prevent resale

by end users do not apply to services or facilities furnished to other common carriers of any existing class, if tariffs covering the service of the other carrier are on file at the appropriate regulatory commission.

(d) Packet Common Carriers (PCCs)

23. Services to PCCs for resale are provided for under special tariffs. As in the cases of RCCs and SCCs, it can be anticipated that GCC personnel who have spent their lifetimes aware of prohibitions against resale of GCC services, will not understand that provisions in basic GCC tariffs intended to prevent resale by uncertificated end users should not be applied to other classes of common carriers until and unless the basic GCC and user tariffs are revised to make that clear internally. AT&T in its Comments at page 7 has cited paragraph 2.2.1 of Tariff No. 263. This paragraph should go on to say that the restrictions do not apply to use of GCC service by common carriers authorized by state or local regulatory agencies, in the performance of their tariffed common carrier services. The same exemption should be made clear in paragraph 2.2.1 of Tariff No. 259 and at paragraph 2.2.1 of Tariff No. 260. Experience has shown that these specific paragraphs are frequently misunderstood and misapplied by GCC employees, resulting in problems for the public served by other common carriers which the Commission does not even know about, and an unnecessary work load at the Commission with respect to those cases which are called to its attention.

(c) Limited Common Carriers (LCCs)

24. ATA has suggested, supra, that public interest in permitting the type of sharing described by AP, DT and others to continue, and the requirements of Section 214 of the Act, combine to require the recognition of an additional type of common carrier authorized to resell communications services on a limited scale and to a limited class and number of other users. ATA has suggested that this class of common carrier could properly be called Limited Common Carriers (LCCs). Presumably the Commission would adopt rules which would permit certification through a simple one-way procedure similar in concept to the licensing of Restricted Radiotelephone Operators. Presumably the Section 214 application would be granted automatically if the number of joint users, the ratio of primary to secondary customer use and the level of administrative charges assessed by the primary user fell within reasonable limits pre-set by the Commission. Presumably the applications of joint users whose scope of operations exceed the guidelines still might be approved by specific Commission staff action, within extended guidelines. And presumably even more extensive resale for profit operations, such as those being undertaken by RCA might possibly be authorized, after Commission consideration.

25. Any Commission action establishing the LCC class should also grandfather, in the LCC Proposed Rule Making proceedings, AP, DJ and other user groups making a proper showing of present resale activities which are in the public interest.

26. GCC basic tariffs should provide that resale of service limited in accordance with LCC authorizations is permitted.

VII. CONCLUSION AND PRAYER

27. Comments herein have shown:

(a) That the provisions in AT&T tariffs concerning resale, joint use and single customer status have evolved historically in response to reasonable requests for service; that the basic structure or plan should not be drastically altered; but that some carrier discriminations and some customer abuses require remedial action.

(b) That the single customer status of ARINC and the airline industry it serves is justified legally, historically and by the public interest.

(c) That extending similar single customer status to ATA and the trucking industry it serves is justified legally, in the public interest and to eliminate existing unreasonable discrimination.

(d) That joint use is reasonably necessary in the operation of many important interstate organizations and that the public interest requires continuation of joint use tariffs.

(e) That there exist fundamental forces which result in abuses of joint use tariffs beyond the control of the General Common Carriers.

(f) That unlimited joint use or sharing is impractical and possibly unlawful and that a Commission Order requiring the same likely would result in destruction of the very communications services which are susceptible to joint use, contrary to public interest.

(g) That the only solution which will preserve the advantages of joint use for those who reasonably require it involves increased Commission enforcement procedures to prevent resale abuses.

(h) That a class of limited common carrier which serves the public interest reselling service does in fact exist today, but has not been given official recognition and has not been controlled by the Commission.

(i) That AT&T tariff language changes and Commission Rule Making are required to solve the problem revealed by the Comments in these matters.

28. In view of the more than three years which have elapsed already since ATA appealed to the Commission to grant the same user rights to the trucking industry that AT&T has extended to the airline industry; in view of the manifest unjustness and unreasonableness of the relative treatment of these two competitive industries as revealed by the comments herein; and in view of the likelihood that these proceedings will continue for an extended time before they are finally resolved, ATA requests the Commission at this time to issue its interim Order to AT&T requiring it to extend to ATA and the trucking

industry the same single customer status which is afforded to ARINC and the airline industry, pending final decision in the Rule Making matters.

Respectfully submitted,

American Trucking Associations, Inc.

Dated: February 24, 1975

LIST OF ORGANIZATIONS WHOSE COMMENTS CONCERNING
SHARED USE AND RESALE OF COMMON CARRIER FACILITIES
ARE ANALYZED HEREIN BY AMERICAN TRUCKING ASSOCIATIONS, INC.

1.	ATA	American Trucking Associations, Inc.
2.	ARINC	Aeronautical Radio, Inc.*
3.	ATAA	Air Transport Association of America *
4.	AFSI	American Facsimile Systems, Inc.
5.	ANPA	American Newspaper Publishers Association
6.	ASC	American Satellite Corporation
7.	AT&T	American Telephone & Telegraph Company
8.	AAR	Association of American Railroads
9.	AP	Associated Press
10.	BW	Bank Wire
11.	BRC	Bunker Ramo Corporation
12.	CIT	Citicorp
13.	CNS	Commodity News and Services, Inc.
14.	CEEMA	Computer and Business Equipment Manufacturers Association
15.	DATRAM	Data Transmission Company
16.	DJ	Dow Jones & Company, Inc.
17.	GS	Graphnet Systems, Inc.
18.	GTE	GTE Service Corporation*
19.	ITT	ITT World Communications, Inc.
20.	MTI	MTI Telecommunications Corporation *
21.	NAM	National Association of Manufacturers
22.	NAMBO	National Association of Motor Bus Owners
23.	NRMA	National Retail Merchants Association, Inc.
24.	NATA	North American Telephone Association
25.	PC	Packet Communications, Inc.
26.	RCA	RCA Global Communications, Inc.
27.	SIAC	Securities Industry Automation Corporation
28.	SPCC	Southern Pacific Communications Company
29.	TCC	Telnet Communications Corporation
30.	UNITED	United Telephone System *
31.	WNSC	Wells National Services Corporation
32.	WU	Western Union Telegraph Company
33.	XF	Xero-Fax, Inc.

* Comments of ARINC, ATAA, GTE, MTI and UNITED include comments from subsidiary or associated companies.

REPLY COMMENTS
Of The
CENTRAL COMMITTEE ON TELECOMMUNICATIONS
Of The
AMERICAN PETROLEUM INSTITUTE

The Central Committee on Telecommunications of the American Petroleum Institute, sometimes hereinafter referred to as the "Central Committee", pursuant to the Notice of Inquiry and Proposed Rule Making^{1/} adopted by the Federal Communications Commission in the above-styled Matter on June 26, 1974, hereby respectfully submits these Reply Comments responsive to the various Comments filed herein by other parties participating in this proceeding.^{2/}

I. PRELIMINARY STATEMENT

1. The Central Committee is one of the standing committees of the Division of Transportation of the American Petroleum Institute whose headquarters are located at 1401 P Street,

^{1/} 39 F.R. 25351, July 10, 1974.

^{2/} The time for filing Reply Comments in this proceeding was extended to February 24, 1975 by Memorandum Opinion and Order of the Chief, Common Carrier Bureau (No. 45-18, January 8, 1975).

N.W., Washington, D.C. 20006. The Central Committee filed its Comments in this proceeding on December 11, 1974. A description of the Central Committee's membership and a discussion of its interest in this proceeding is set forth in those Comments. In the interest of brevity, and to the degree possible, we shall attempt to avoid restatement of those matters in these Reply Comments.

2. In its Comments of December 11, 1974, the Central Committee urged the Commission to review the possible removal of artificial tariff barriers to the resale and shared use of private line services -- even though such changes might require established carriers to reprice some of their services. Additionally, the Central Committee expressed the view that non-carrier entities should be permitted to resell private line services on a for-profit basis when they add value to the basic circuit. While the Central Committee feels that such value-added offerings will probably be self-controlling with respect to the rates charged and the quality of service provided, it did suggest that the Commission should have the opportunity for ultimate review and regulation of those services. Finally, and absent the development of replacement sharing provisions, the Central Committee expressed the strong view that 32.2.1(c) of AIAI Tariff F.C.C. No. 260 should be retained in its present form.

3. In its initial Comments, the Central Committee did not specifically support any new forms of private line service sharing. The Central Committee simply stated its belief that the public interest could be served by the judicious removal of some restrictions on the shared use of private line services. Although it was hoped that interested carriers would come forward with specific proposals which could be reviewed in the "reply" stage of this proceeding, few new concepts have been offered beyond those tied closely to the existing regulations governing the non-profit, cost sharing of private operational fixed microwave facilities. Nevertheless, these Reply Comments will be directed primarily at the "sharing" and "single user" issues which are the matters of principal concern to the Central Committee in this proceeding.

II. REPLY COMMENTS

4. In general, the Central Committee would support the implementation of new tariff provisions and adoption of new Commission Rules and Regulations providing for the non-profit, cost sharing of private line services with certain limitations. The Central Committee concurs in the views expressed by others herein that each participant in a sharing arrangement must have its own individual communications requirement so as to more adequately assure that there is no

profit motive involved. The Central Committee has no underlying objection to the resale of services when a real value to the customer is added. It does believe, however, that such offerings must be governed by regulations and tariff provisions completely separate from those covering the non-profit, cost sharing of private line facilities.

5. The Central Committee does not feel that the public interest will be served by restricting such sharing to voice grade and under circuits. American Telephone and Telegraph Company (AT&T) argued in its Comments that "unlimited resale and sharing" would result in further "de-averaging" of rates. As the Central Committee stated in its initial Comments, it realizes that some price restructuring may be necessary if substantial changes are made in the current resale and sharing policies. At the same time, however, the Central Committee observed that elimination of current barriers to resale and sharing could also pave the way for reduced carrier plant and capital investment. While the adoption of more liberal sharing policies, including the shared use of broadband facilities, may cause substantial changes in toll offerings, limiting such sharing to voice grade or under circuits would effectively eliminate the attractiveness of entering into new sharing arrangements by petroleum and gas industry communication users who do have multiple circuit private line requirements.

6. As noted in the foregoing paragraph, AT&T has expressed concern over the prospect of "unlimited resale and sharing" of leased private line services. The Central Committee would share those concerns if it were proposed to remove all restrictions from the resale and shared use of private line services. As discussed herein, however, "unlimited" resale and sharing is not proposed by the petroleum and gas industries at this point. It is felt, however, that AT&T has erred in considering the possibility of new "resale" and "sharing" policies as complementary or joint proposals. In the Central Committee's view, "resale" and "sharing" are separate concepts which must be examined and considered individually by carriers, users and the Commission.

7. Both MCI Telecommunications Corporation, et al. (MCI), and Data Transmission Company (DATTRAN) have made a similar error in criticizing the provisions of §2.2.1 of AT&T Tariff F.C.C. No. 260 in its entirety without considering each individual provision separately. For instance, MCI argued that the entire single customer concept "is a troublesome one which poses a danger of discriminatory treatment in violation of Section 202(a) of the Communications Act and of the Commission's ruling in the Telcel Sharing Case" Similarly, DATTRAN said that it "believes there is no justification for provisions in current AT&T and Western Union tariffs which accord

special tariff treatment to specific entities or classes of entities." DATPAM argued that "these provisions constitute prima facie violations of Section 202(a) of the Communications Act, and their removal must be ordered by the Commission as soon as practical."

8. The separate provisions of AT&T Tariff F.C.C. No. 260 must be reviewed individually because they embody different concepts. For instance, while some of the provisions look toward the provision of services to entities which are entirely unrelated from a corporate point of view, §2.2.1(c) simply permits a corporate customer to transmit "communications relating directly to the business of a subsidiary corporation over which the customer exercises control through the ownership of more than 50% of the voting stock." As the Central Committee noted in its initial Comments, the tariff would indeed be discriminatory if it failed to include such a provision because some corporate communication users prefer to organize their business on a divisional basis, while others elect to operate through wholly or partially owned subsidiary corporations. In the absence of provisions such as those contained in §2.2.1(c), the business organization operating with subsidiary corporations instead of on a divisional basis would be unreasonably penalized because each subsidiary corporation would then have to obtain its own separate private line circuit or circuits. Each of the provisions now contained in §2.2.1 of AT&T Tariff F.C.C. No. 260 must therefore be examined individually -- and stand or fall on its own merits.

III. CONCLUSION

9. Sharing of private line services should be permitted on a non-profit, cost sharing basis where each participant has an individual communications requirement. Such sharing should not be limited to voice or under channels. Should carriers conclude that this limited form of sharing would necessitate restructuring of rates, they should promptly provide the Commission with reasonably firm data reflecting the type of impact such changes might have on existing rates. Separate consideration should be given to removing tariff restrictions which now prohibit the resale of services, particularly when circuits are to be resold with an identifiable value added.

10. The so-called "single user" provisions of §2.2.1 of AT&T Tariff F.C.C. No. 260 must be examined individually and not jointly. The provisions of §2.2.1(c) of that tariff cannot be eliminated without inflicting an unreasonable discrimination on those customers who elect to conduct their businesses through subsidiary corporations as compared to those who operate their businesses on a divisional basis. Of course, the provisions of §2.2.1(c) could be eliminated if new tariff sharing provisions are implemented which would permit those customers who do operate with subsidiary corporations to obtain their communication services on an equal footing with those customers conducting their operations under a divisional organization.

WHEREFORE, THE PREMISES CONSIDERED, the Central Committee on Telecommunications of the American Petroleum Institute respectfully submits these Reply Comments and urges the Federal Communications Commission to proceed in this matter in a manner consistent with the views expressed herein.

Respectfully submitted,

CENTRAL COMMITTEE On
TELECOMMUNICATIONS Of The
AMERICAN PETROLEUM INSTITUTE

DATED: February 24, 1975

REPLY COMMENTS OF UNITED SYSTEM SERVICE, INC. ON
BEHALF OF MEMBER COMPANIES OF THE UNITED TELEPHONE SYSTEM

Pursuant to the Commission's "Notice of Inquiry and Proposed Rule Making" released July 5, 1974, in the captioned Docket, United System Service, Inc. (hereinafter referred to as "United") on behalf of the member companies of the United Telephone System* by its attorneys respectfully submits its Reply Comments.

PRELIMINARY STATEMENT

After analysis of the initial Comments filed in this proceeding, it is apparent that the majority of the parties are in agreement that resale of common carrier services and facilities requires Section 214 authority and that the wholesale removal of resale restrictions in existing tariffs would not be in the public interest. As to the tariff classifications of "joint user", "authorized user", and "single customer", the majority of the parties again do not support the wholesale removal of existing restrictions. Certain parties, however, do seek more liberal tariff provisions to enable them or others similarly situated to "share." Basically, what this involves is a question of fact as to the lawfulness

* A complete listing of member companies of the United Telephone System is set forth in United's "Comments".

of existing tariff provisions rather than resolution through the adoption of broad policy. The common carrier status of other entities, such as the facsimile groups, also has been discussed in some of the Comments. Again, this raises a question involving an issue of fact rather than calling for the adopting of broad policy in that the technical nature of these and other proposals must be known and assessed on a case-by-case basis before a determination can be made as to an entity's common carrier or non-carrier status.

Hereinafter, United has limited its Reply to a discussion of the two fundamental issues in this proceeding; namely, (a) resale, and (b) the tariff classifications of "joint user", "authorized user", and "single customer."

RESALE

1. The Commission in this proceeding has sought to consider policy with regard to, among other things, the resale of all common carrier services and facilities and to determine the role of the middleman in the provision of communications services to the public. In responding to the items of inquiry in this proceeding, United, in its "Comments," defined resale as the "purchase of communication services, or the lease of facilities from a communications common carrier by a person and the subsequent sale of such services or the subletting of such facilities to other persons." It was, and continues to be, our view that any person engaged in such resale is a communications common carrier for hire, subject to the FCC's jurisdiction, and must have Section 214 authority before providing any services.

2. To further delineate our views herein with regard to resale, it is necessary to distinguish between the type of resale proposed by some of the value added carriers and the type of resale which involves arbitrage. Under the value added carrier form of resale, entities lease facilities from existing common carriers and through the application of technology actually provide the public with a new or different service from that the public can obtain from existing carriers. Under the arbitrage type or form of resale, a middleman or broker with little or no investment leases facilities from existing common carriers and provides his subscribers with a service no different from that obtainable from existing carriers except to the extent that the subscriber may realize a lower rate for the service.

3. Both of these forms or types of resale constitute a common carrier undertaking for the reason that (1) there is holding out to the public; (2) compensation is received for the service; (3) and the customer has control over what intelligence is transmitted. Frontier Broadcasting v. Collier, 24 FCC 251, 254 (1958).

4. The question then, as we view it, is not whether the Commission should regulate resale of common carrier services in light of its mandate under the Act to regulate interstate and foreign communications services unless otherwise exempted therefrom, but, rather, which form or type of resale should be authorized by the Commission as being in the public interest.

5. Regarding the arbitrage situation, various state commission decisions, among others, have upheld telephone company restrictions on the resale of services on the basis that:

- (1) it would establish a third party between the telephone company and users of its service.
- (2) the middleman would use only such equipment as he considered necessary.
- (3) all of the company's dealing with the real users of its service would be through the medium of a third party over which the company would have no control, since, presumably the middleman would not be considered a utility.
- (4) many difficulties would be thrown in the way of providing efficient service from the telephone company standpoint as well as from the standpoint of regulation, and service complaints would multiply with little chance of timely correction, Gelsam Realty Co., v. New York Telephone Co., P.U.R. 1929, A. 224, 226 (1928). See also the Supreme Court's holding in Ambassador, Inc. v. United States 325 U. S. 217 (1945) and 1015 Chestnut Street Corp. v. Bell Telephone Co. of Pennsylvania 10 Pa. P.S.C. 492 (1930).

6. United submits that there is no basis herein for formulating policy to permit the arbitrage form of resale. As previously noted in our Comments, it is one thing to develop a new or different service through the application of technology, but it is quite another to permit rate discounts to existing services when no technological or other reasons exist to justify such discounts. Our

reading of other parties' Comments indicates that we are not alone in this belief -- see, for example, the Comments of Datran, RCA Globcom, MCI, Telenet, American Trucking Association, Southern Pacific, AT&T, GT&E, and Western Union.

7. While, as we have previously stated, both the value added form of resale and the arbitrage form of resale constitute a common carrier undertaking subject to the FCC's jurisdiction, we are not opposed to the value added proposal if the public is able to obtain new services not now available from existing carriers. With regard to those presently certificated value added carriers, the Commission has had an opportunity to determine, on an individual basis, that the proposed undertaking would, in fact, serve the public convenience and necessity. The proposals of other value added entities should be subject to similar scrutiny on a case-by-case basis, and if it can be shown that the value added entrant will offer a service not being offered by existing carriers and that a demand has been shown to exist for the proposed new service, then that applicant can be granted 214 authority. However, we are opposed to the wholesale removal of resale restrictions. Such removal of these restrictions would permit arbitrage which would have a deleterious effect on United as well as the entire telecommunications industry. Thus, the economic impacts with which we are concerned in this proceeding derive not from the introduction of new and innovative services through the application of technology, but from the wholesale elimination of tariff restrictions on resale of private line services.

8. Despite the fact that the Commission has deemed it "inappropriate" to consider the question of availability of services for resale and shared use and the regulation thereof within the context of some particular item because of its mandate "... to make available to all people ... rapid, efficient ... communications services ...", we submit that the complexity and far-reaching economic consequences of this proceeding militate against adopting a policy herein which would permit widespread resale of common carrier services and facilities. Moreover, the Commission's mandate to make available to all people of the United States rapid and efficient communications services also requires that these services be provided at reasonable charges. AT&T's estimate of the cost and revenue effect of wholesale removal of resale and sharing restrictions indicated that on a conservative basis unlimited resale and sharing of communication services would result in a loss of net revenue in excess of 178 million dollars annually (AT&T Comments, p. 33). Such estimated effect encompasses only AT&T, however the Independent telephone industry would be similarly affected.

9. In light of the aforesaid, United is of the view that it would not be in the public interest nor consonant with the Commission's stated mandate to adopt policy permitting wholesale removal of resale restrictions. Instead, the Commission should adhere to a Section 214 approach with regard to those entities desiring to provide a new or different service to the public.

10. The terms "joint user," "authorized user," and "single customer" are tariff classifications and nothing more. For the purposes of this inquiry, these terms are synonymous with "sharing." As we have defined "sharing" in our Comments, it is "the cooperative use of a communication service by more than one person and where the costs of such service are allocated, on some basis, to the person using such services." As a tariff classification sharing is thus subject to the prohibitions against unjust and unreasonable discrimination as provided in Sections 201 (b) and 202 (a) of the Act.

11. To summarize briefly our views with respect to the adoption of policy extending the sharing of private line and other services offered by existing carriers, United believes:

- (1) services such as WATS and MTS are not those designed to permit the sophisticated, augmented non-voice services for which the Commission apparently believes there is a demonstrable, rapidly growing market.
- (2) basically the current tariff restrictions limiting the sharing of private line services to voice grade and under is based on the engineering design of the exchange plant of the telephone companies which is designed, generally, to provide basic voice grade services.
- (3) the alleged public need for augmented non-voice communications services cannot be met by permitting the carte blanche sharing of all private line, MTS, and WATS services

due to the engineering and plant required for these services.

- (4) economically unrestricted sharing could have an adverse impact upon a common carrier's local exchange subscribers due to the cross elasticity between private line services and MTS.
- (5) the adoption of policy relative to sharing would run counter to the public interest if the economic consequences were not thoroughly assessed before any policy is promulgated.
- (6) to eliminate an after-the-fact approach, before any policy is adopted regarding extension of sharing, data should be obtained as to the effect on subscriber rates and Independent company settlements as well as the existing customer demand.

12. As recognized by various parties, such as Telenet, MCI, RCA Globcom, Southern Pacific, GT&E, Datran, ARINC, The Association of American Railroads, Western Union, and the Commodity News Services, Inc., the elimination of all tariff restrictions would result in sharing being nothing more than a subterfuge for resale. Without some form of restrictions on sharing, entities would be permitted to engage in a resale activity as a common carrier but would not be subject to the required FCC regulatory controls. In order to ensure that a customer sharing his communication services and facilities with others does not engage in resale, United and other parties believe that the necessary distinction between resale and sharing can only be maintained by at least requiring that each

person have a bone fide communications need of his own as well as pay no more than the allocated cost of his service. (See, for example, the Comments of Datran, Telenet, the American Association of Railroads, Western Union, ARINC, and Southern Pacific).

13. While basically it is not disputed in the different Comments that the wholesale elimination of sharing restrictions would not be in the public interest, some parties do advocate the extension of certain tariff classifications. The National Retail Merchants Association and the American Trucking Association, for example, would like to receive single customer treatment while others, such as the American Association of Railroads and the Utilities Telecommunications Council, believe that "sharing" should be extended to include at least all rate regulated entities.

14. As heretofore noted, for the reasons set forth in paragraph 11, supra, United is opposed to the wholesale elimination of existing tariff restrictions on sharing. Since the tariff classifications in question are subject to the justness and reasonableness provisions of Sections 201 (b) and 202 (a), it is our belief that if, as a result of this proceeding, the Commission believes that the carriers have not made a prima facie showing that their tariff classifications are just and reasonable, the Commission can, under Section 205 (a) of the Act, after an opportunity for hearing, prescribe what classifications, regulations, or practices will be just, fair, and reasonable.

CONCLUSION

1226

For all the foregoing reasons, United urges the Commission to consider the recommendations herein before promulgating any policy regarding wholesale elimination of resale and sharing provisions.

Respectfully submitted,

UNITED SYSTEM SERVICE, INC.

February 24, 1975

REPLY COMMENTS OF
AERONAUTICAL RADIO, INC., AND
THE AIR TRANSPORT ASSOCIATION OF AMERICA

Aeronautical Radio, Inc. (ARINC), and the Air Transport Association of America (ATA), pursuant to the Commission's Notice of Inquiry and Proposed Rule Making released herein on July 5, 1974, 47 F.C.C.2d 644 (1974),¹ hereby submit their joint reply to the initial comments submitted in this proceeding.

I. INTRODUCTORY STATEMENT

In response to the Commission's Notice of Inquiry and Proposed Rule Making, comments have been filed by 37

¹By Order released January 9, 1975, the Chief of the Common Carrier Bureau extended the time for Reply Comments to February 24, 1975, and the time for Responses to March 26, 1975. 40 Fed. Reg. 2451 (1975).

parties representing a wide diversity of user and carrier interests. These comments point generally to the common conclusion that the present practices and regulations of the carriers with respect to use, sharing, and resale of common carrier services and facilities have been on the whole responsive to the public interest.

While user interests supported flexibility in conditions of use and a liberal approach to sharing, especially of discrete facilities, there was no broad appeal from users or carriers for removal of all restrictions against sharing and resale. AT&T in its submission opposed a complete removal of its restrictions against shared use and resale, which it said would result in a substantial loss in net revenues (on the order of \$178 million annually) necessitating large scale repricing and restructuring of its services.² The other carriers expressed different views as to the precise limits of use, sharing, and resale, but uniformly supported some continued restraint as best serving the needs of the public.

On the issue of industry customers (or "single customers"), there was, with but a single exception, no direct opposition to the concept in general or to ARINC's role as customer for the air transport industry in

²AT&T Comments, p.25.

particular.³ The manner and degree to which the concept might be expanded, if at all, was the subject of substantial comment which will be discussed more fully below.

In the view of ARINC and ATA, the overall teaching of the initial submissions is that no broad revamping of common carrier policies is required or appropriate; rather, the carriers ("established," "specialized," and "value added") should be left as free as possible to respond to the diversified and rapidly changing needs of the marketplace. The complexity and fluidity of today's interstate communications services do not call for a broad regulatory "fix." To the extent that any user, or category of users, feels that its needs are not being fulfilled as required by §201(a) of the Act, these specific needs should be addressed by the carriers and the Commission, without seeking to impose a common mold for all.

II. THE COMMENTS SHOW GENERAL SUPPORT FOR THE SINGLE CUSTOMER CONCEPT

A. The Record Establishes that ARINC's Customer Status Is Fully Justified and Serves the Public Interest.

ARINC in its initial comments on Item of Inquiry No. 9 (relating to the so-called "single customer" tariff

³The only party opposing ARINC's customer status was Data Transmission Company (Datran), but Datran's opposition is wholly without merit. See infra, pp.11-18.

provisions) explained its unique and historical role in the provision of telecommunications services to the air transport industry and specifically addressed the question of the lawfulness and practical utility of ARINC's status in relation to ¶2.2.1(A) and (G) of AT&T's and Western Union's Private Line Tariffs, F.C.C. Nos. 260 and 254, respectively.⁴

As further shown in the statements filed by ATA and representative member airlines and in the statements of the commuter air carriers, the development of integrated, nationwide intercity communications services by ARINC has played an important part in the development of a safe, efficient, convenient, and economic air transport system for the people of the United States. These intercity communication services available through ARINC to all air carriers, large and small, have promoted the growth and integration of an

⁴¶2.2.1(G) of AT&T's and Western Union's Private Line Tariffs F.C.C. Nos. 260 and 254, respectively, provides that private line service may be used as follows:

* * *

"(G) For the transmission of communications to, from, within and between air carriers, where the customer is an aeronautical communication company licensed under the Aviation Services rules of the Commission to operate stations in the aeronautical mobile and fixed services."

industry consisting of several hundred intensely competitive components, providing the safest and most convenient service possible to the public at large. The public is the ultimate beneficiary of the efficiencies and economies realized through ARINC.

That provision of service to ARINC is "reasonable," and thus required, under §201(a) of the Communications Act seems beyond serious question. Therefore, it is not surprising that the reasonableness of "customer" service to ARINC by common carriers was virtually unchallenged in the initial submissions, and, indeed, affirmatively supported by the bulk of those who commented on the subject.

For example, AT&T explained that its tariff provisions authorizing customer status for various entities "reflect situations where special provisions are proper in order (a) to meet the realities of business, (b) to further these policies of the United States Government, (c) to promote the health and safety of the public, and (d) to permit innovative service concepts."⁵

⁵AT&T Comments, p.13 (footnotes omitted). AT&T also points out that contrary to the Commission's statement in its Notice, "not all these provisions are 'exceptions'." Id. We agree that a carrier responding to a legitimate requirement for service should not be considered to be making an "exception."

Moreover, AT&T specifically explained that its Tariff F.C.C. No. 260, ¶2.2.1(G), which recognizes ARINC's customer status, was filed "to promote the safety of life and property in the air" ⁶ To the same effect is the observation of RCA Global Communications, Inc. (RCA Globcom), that the customer "treatment accorded ARINC is based on historical factors and on a specifically adopted Commission policy which recognized important public safety considerations." ⁷

User parties also recognized the importance of carriers serving ARINC as customer. The American Trucking Associations, Inc., for example, pointed out that "[t]he telephone industry has recognized the needs of the air transportation industry for a proper communications system tailored to the varied and various needs of that industry and has extended to ARINC the right centrally to order, control and operate administratively a nationwide network of leased communication circuits to serve the industry needs on a satisfactory, operationally practicable and inter-industry economically-competitive basis." ⁸

⁶Id., p.13 n.3.

⁷RCA Globcom Comments, p.14. See also GTE Comments, p. 31.

⁸American Trucking Associations Comments, p.4.

Similarly, the National Association of Motor Bus Owners (NAMBO) referred to ARINC's single customer status as being "a status which is clearly merited under the circumstances."⁹

B. The Need for Additional Industry Customers, If Any, Should Be Evaluated Case-by-Case.

A number of parties suggested, in general terms, that if there are entities who should be currently recognized as customers, but are not, the solution is one of selective expansion, not contraction. The Associated Press (AP), for example, specifically noted in its comments that "these single customer provisions were adopted on an ad hoc basis," and suggested that where eligible customers were improperly being refused service by carriers, the Commission should "order any such refusals to serve to be remedied by a broadening of applicable tariff provisions to include customers now improperly excluded, rather than by a contradiction in service to existing customers."¹⁰ Similar suggestions were advanced in the comments of other participants, including the Commodity News Service, Inc.

⁹ NAMBO Comments, p.10.

¹⁰ AP Comments, p.21.

(CNS),¹¹ Bunker Ramo Corporation,¹² the Securities Industry Automation Corporation (SIAC),¹³ and the Southern Pacific Communications Company (SPCC).¹⁴

One participant, the National Retail Merchants Association, Inc. (NRMA), went so far as to urge the Commission to encourage the creation of "voluntary non-profit communications user associations" -- customer cooperatives -- and thereby expand the single customer status so as to afford "equal opportunity for all industries . . . to avail themselves of optimum communications systems configurations and charges."¹⁵

Only three user representatives, the American Trucking Associations, NAMBO, and NRMA contended that if customer recognition were not accorded them, then unlawful discrimination would result.¹⁶ ARINC and ATA do not intend to evaluate the individual needs or claims of other

¹¹CNS Comments, p.13.

¹²Bunker Ramo Comments, pp.11-21.

¹³SIAC Comments, p.16.

¹⁴SPCC Comments, p.16.

¹⁵NRMA Comments, pp.8-9.

¹⁶American Trucking Associations Comments, pp.27-31; NAMBO Comments, pp.3-4, 10-11; NRMA Comments, pp.8-10.

industries, and certainly not to oppose their requests for service. But, regardless of the merit of any requests for service by other parties, there can be no basis for impairing the role which ARINC performs on behalf of the air transport industry. As detailed in ARINC's initial submission, ARINC's right to service is founded in the duty of common carriers to serve under §201(a) of the Act, and service to ARINC cannot be denied simply because someone else may also be entitled to service.¹⁷

The past recognition of customers on an ad hoc basis has served the public well and further requirements should also be considered case-by-case. ARINC and ATA, at this time, have no further comment with respect to various suggestions as to how "customer concepts" might be broadened, except insofar as those suggestions might impinge on the scope of ARINC's present services.

Thus, for example, the American Trucking Associations urged that customer status be extended to them and have

¹⁷ In this regard, we feel that the motor carrier industry's entitlement to service should be based on the demonstrated showing of its own communications needs and structures rather than on the fact that the industry may compete to some degree with the airline industry for passengers and cargo.

proposed certain revised language for ¶2.2.1(G) of AT&T's and Western Union's Tariffs rather than a new provision¹⁸ to meet their needs. Whatever additional language, if any, may ultimately be deemed appropriate to broaden ¶2.2.1 of the Private Line Tariffs, there is no basis for modifying the present language of ¶2.2.1(G). ARINC is now able to discharge its responsibilities to serve all segments of the air transport industry pursuant to the present tariffs of AT&T, Western Union, and the other domestic and international carriers. To try to compress ARINC's role and the structure of the air transport industry, and its unique requirements, within a tariff description that fits regulated truck and bus operators has no merit.

ARINC, in response to the Commission's Item of Inquiry No. 10 relating to possible actions as to ¶2.2.1 of AT&T's and Western Union's Tariffs, suggested both a possible framework for continuation of the current ad hoc approach and a possible general tariff provision similar to¹⁹ that contained in MCI Tariff F.C.C. No. 1. ARINC emphasized, however, that these "suggestions are simply in response to the spirit of the Commission's hypothetical question in Item No. 10 and [did] not represent an ARINC conclusion

¹⁸ American Trucking Associations Comments, p. 22.

¹⁹ See ARINC Comments, pp. 66-73.

as to the need for any remedial action by the Commission."²⁰
The comments in this proceeding at this time strongly support the wisdom of a continuation of the current ad hoc approach, evaluating new requirements in light of ARINC's proposed guidelines rather than ordering the carriers to file a single, broad customer provision.

C. Datran's Objections to ARINC's Customer Status Are Without Merit.

Datran, one of the new specialized common carriers, is the only party whose comments oppose the basic concept that ARINC should be the customer of the common carriers.²¹ Datran adjures the Commission to "eliminate the cancer that is embodied in the single user concept,"²² but does not

²⁰Id., p. 73.

²¹MCI Telecommunications Corporation (MCI), another of the new specialized common carriers, described the single customer concept as "a troublesome one," particularly as to any prospect for expansion. MCI Comments, pp.3-4. Its posture, however, seems to be one of awaiting an opportunity to review the initial submissions before formulating its definitive position. See id., p.21. Although it made no reference to ARINC here, in its original Petition seeking the inauguration of this inquiry MCI observed that: "The 'single user' concept . . . has long been applied to ARINC, the entity which provides communications service to the nation's air carriers" MCI Petition in RM-1997. p.36, June 13, 1972.

Western Union also questioned the role of "middlemen" generally, but its main complaint seemed to relate to the impact on it of AT&T's bulk rates, which the Commission has ruled is not at issue in this proceeding. See Memorandum Opinion & Order (Docket 20097) released October 3, 1974 (FCC 74-1030), ¶17.

²²Datran Comments, p. 37.

support this invective with any careful or considered analysis of the requirements of the air transport industry or of carrier obligations under Section 201(a) of the Communications Act.

First, Datran suggests that changes since 1937 raise serious questions as to the current relevance of "the old ARINC precedent" contained in ARINC v. AT&T, 4 F.C.C. 155 (1937).²³ In fact, the passage of time has worked in the opposite direction. While details of operation have changed, the basic principles recognized in the 1937 decision apply with even greater force today.

As shown in ARINC's Comments, air carrier operators today have even greater need for a reliable integrated intercity communications system than ever before.²⁴ As for certificated air carriers, larger aircraft are making more operations and carrying more passengers than in 1937.²⁵ ATA's Comments attest to the increased reliance of the certificated air carriers on sophisticated communications to improve online and interline airline service to the nation as

²³Id., at pp.36, 37.

²⁴ARINC Comments, pp.8n.4, 24-26.

²⁵See Airlines Exhibit No. 2, pp.19-25 (Docket 20097).

a whole.²⁶

Moreover, as shown in the commuter air carrier statements submitted with ARINC's Comments, the commuter air carriers have added an entirely new dimension to the communications requirements of the integrated air carrier system.²⁷ These relatively small operators provide regular, valuable service to the public using aircraft of roughly the capacity of aircraft in use in 1937. And yet, their business relies to a significant degree on the ability to provide connecting service with the trunk and regional carriers. Thus, the current structure and activities of ARINC and the air transport industry make ARINC's customer status all the more compelling today.

Second, in making its arguments, Datran refers to dicta contained in the Commission's hearing order which initiated Docket 19746, since superseded by the current proceeding.²⁸ But this dicta in an unreviewable hearing order, issued by the Commission prior to the receipt of any evidence, cannot imply, as Datran suggests, that the

²⁶Airlines Exhibit Nos. 1-5.

²⁷ARINC Comments, Apps. 2, 3.

²⁸Datran Comments, p.37 (citing American Trucking Ass'ns v. AT&T, 41 F.C.C.2d 2, 4-5 (1973)).

Commission has already reached an "apparent conclusion" as to current applicability of its holding in the 1937 ARINC Case. If this were so, it would represent the most reprehensible form of prejudgment and one which we assume neither the Commission nor its staff indeed made.²⁹

On the other hand, Datran does assert: "Experience indicates that ARINC has the capacity to develop, implement

²⁹The cited Hearing Order initiated Docket 19746, which was a complaint proceeding brought by the American Trucking Associations against AT&T seeking single customer status for the motor carrier industry. That proceeding was terminated after one prehearing conference, and the essential issues therein were incorporated into this Docket 20097.

In connection with the prehearing conference in Docket 19746 held on July 5, 1973, ARINC counsel commented to the Administrative Law Judge, inter alia:

"We are also constrained to point out that the Commission's brief paraphrase of the 1937 Decision in its Hearing Order (¶12) is by no means an accurate statement of either the holding or the significance of that case, and we assume that the Commission's reference to the Decision will in no way limit your own independent review of the case or curtail your right to determine, at the appropriate time, the extent to which the principles established therein are applicable to the facts developed in the present proceeding." Letter from ARINC counsel to Administrative Law Judge Sharfman, June 27, 1973.

Here, as in Docket 19746, ARINC expects the Commission's determinations to be made on the record, not based upon supported dicta contained in unreviewable hearing orders.

and operate innovative communications-based systems to satisfy the special needs of the air transport industry." Curiously, however, Datran refused to acknowledge ARINC's useful role in private line intercity communications.³⁰

What ARINC actually does as the industry's "customer" today is discussed at some length in its initial comments and need not be repeated here. But, Datran either wishes to ignore ARINC's role or misunderstands what it does. On behalf of the air transport industry in private line intercity communications, ARINC does many things. For example: (1) where common carrier line haul service is inadequate, it builds and operates private microwave systems (some 5,320 circuit miles at present);³¹ where

³⁰Datran comments, p.38n.48 (characterizing ARINC as "little more" than a "communications broker"). Datran also accuses ARINC of being "an obstacle to specialized carriers." Id. And yet, the 302 specialized common carrier and domestic satellite circuits installed or on order on November 20, 1974 (ARINC Comments, p.16n.12), had grown to 553 by February 18, 1975, and further growth is expected. Datran's individual failure to provide any of these circuits can be laid in part at least to the fact that ARINC's total medium speed data requirement for the six cities served by Datran through the end of 1974 was only for 24 circuits, 6 of which were intrastate. ARINC, for its part, provided these and other industry data to Datran and the other carriers, and provided all communications carriers (including Datran) a forum at various seminars held across the nation which were attended by numerous airline and computer personnel. See ARINC Comments, p.48n.28.

³¹ARINC Comments, p.43. Indeed, the Commission has previously recognized that ARINC's customer status with the (Continued on following page.)

multiplexing improves efficiency ARINC provides it (some \$800,000 invested to date in multiplex equipment);³² where other terminal equipment, including state of the art switching is needed, ARINC sees that it is done by the best means available;³³ where ARINC takes service from a large nationwide carrier, such as AT&T, it takes every step practical to optimize its network -- as Datran indeed suggests -- under existing interstate and intra-state tariffs of that carrier (some \$240,000 expended to date on computer software for network optimization);³⁴ and where specialized carriers offer useful, reliable, and economic private line services, ARINC also brings those into the industry network.

Therefore, ARINC and ATA submit that the record in this proceeding firmly establishes the propriety and lawfulness of the air transport industry's integrated telecommunications network provided by ARINC as the customer for common carrier services and as licensee for the

(Continued from previous page.)
communications carriers is comparable to its licensee status relative to its industry private microwave systems, and thus is the relevant consideration in determining competitive necessity. See Telpak Sharing, 23 F.C.C.2d 606, 610-11 (1970). Compare AT&T Comments, pp.27-28; GTE Comments, p.29.

³² Id., p.16.

³³ Id., pp.20-24.

³⁴ Id., p.15.

radio and microwave services. Through this industry approach to such a vital part of aviation as communications, the safety, convenience, efficiency, and economy of air carrier service to the public has been greatly enhanced.

III. COMMENTS ON SHARING DO NOT DEMONSTRATE ANY
FUNDAMENTAL DISSATISFACTION WITH CURRENT
PRACTICES

In its initial comments, ARINC maintained that "the present joint use arrangements satisfy legitimate public needs and contribute to the efficient use of communications resources,"³⁵ but questioned "whether there is justification, consistent with the goals of permitting the widest degree of flexibility for customers in the use of their service, for limiting sharing of broader bandwidth services provided by discrete facilities."³⁶ The comments of other users also reflect this basic approach.

Basically, the user comments favor a somewhat more liberal approach to the sharing of discrete services and facilities than current tariff restrictions, but these comments are often non-specific as to changes desired.³⁷

³⁵Id., p.78.

³⁶Id., p.79.

³⁷See AAR Comments, pp.7, 11; AP Comments, pp.16, 20; ANPA Comments, pp.6-7; Bank Wire Comments, p.1; Bunker Ramo Comments, p.10; CNS Comments, pp.9-12; Dow Jones Comments, p.16; NAM Comments, p.2; UTC Comments, p.5.

Most carriers on the other hand appear willing to accept some increased sharing to the extent that it may be justified.³⁸ For example, while such increased shared use as may be required by users has not at this time been identified with any particularity, AT&T states that it "stands ready further to revise its tariff to provide for such augmented use of its services."³⁹ Understandably, however, AT&T would prefer to respond to specific requests for augmented technology in light of the requirements of all of its users, rather than adopt broad new tariffs in the abstract.

Again, the ad hoc approach to shared use arrangements for discrete facilities seems to have served the public interest well. ARINC and ATA, however, do agree with other users that restrictions on sharing of discrete broadband may impede technical innovation,⁴⁰ and we continue

³⁸See, e.g., AT&T Comments, p. 38; Datran Comments, pp. 26-28; MCI Comments, p. 4, but see p. 14; SPCC Comments, pp. 14-15; Telenet Comments, pp. 15-16; GTE Comments, pp. 5-6.

It is regrettable that the retrogressive and restrictive principles reflected in the current Recommendation D.1 of CCITT pervades the views of ITT World Communications, Inc., which apparently opposes all sharing and joint use. See ITT Worldcom Comments, pp. 3-7, 16.

³⁹AT&T Comments, p. 38.

⁴⁰See, e.g., ANPA Comments, p. 7; RPSS Comments, p. 7.

to suggest greater freedom to use broadband channels, such as AT&T's Series 8,000 service.

Even as to increased sharing, the answer may lie in reliance upon the responses of all of the carriers to the needs of the marketplace. For example, MCI notes that its tariff permits shared use of broadband service with a minimum bandwidth of 240 kHz.⁴¹ Similarly, AT&T's new Dataphone Digital Service (DDS) Tariff permits increased sharing of service at data speeds up to 56 kilobits per second,⁴² and the Commission in its decision to authorize AT&T to proceed with DDS service over a five-city network observed that the service would "provide valuable inputs to our further deliberations on shared use and resale of communications services in Docket 20097."⁴³ Thus, the Commission should take care in this proceeding not to prescribe a regulatory scheme for shared use which may be unnecessary and quickly become obsolete.

⁴¹MCI Comments, p. 14.

⁴²See AT&T Tariff F.C.C. No. 267, ¶2.2.5(B).

⁴³Memorandum Opinion and order (Docket 20288) released Dec. 16, 1974 (FCC 74-1370), ¶27. We assume any inputs from Docket 20288 placed in the record of this proceeding will be subject to review and reply by interested parties in Docket 20097.

IV. THE COMMISSION SHOULD NOT IMPOSE
UNNECESSARY REGULATION UPON
CUSTOMERS, SHARED USE, OR RESALE
OF COMMUNICATIONS

ARINC and ATA find themselves in accord with the vast majority of participants in this proceeding on the degree to which the Commission should impose regulation on shared or resold communications services.

Virtually no party felt that not-for-profit sharing arrangements or arrangements between industry customers and members of that industry required regulation by the Commission, although some commentators felt that copies of cost-sharing arrangements should be filed with the Commission to make sure that the transaction was not a for-profit "resale" in disguise.⁴⁴ ARINC and ATA stand with those who feel that such a procedure would be unnecessary and burdensome both to the public and the Commission.⁴⁵

The Commission should not impose regulation upon communications services which are not "for hire." Cf. Section 3(h) of the Act. The Commission has traditionally

⁴⁴E.g., AAR Comments, p.11; MCI Comments, pp.18-19; see RCA Globcom Comments, pp.14-15.

⁴⁵See, e.g., ARINC Comments, p.80; ANPA Comments, p.7; CNS Comments, pp.15-16; SIAC Comments, p.48.

- 21 -

forborne common carrier regulation of "industry-wide" not-for-profit services involving communications,⁴⁶ and it should continue to do so.

Most parties seem to recognize that the potential for abuse is reduced to insignificance when the profit element is removed. Moreover, the present tariffs of AT&T and Western Union expressly permit "an arrangement between the customers and the authorized or joint user to share the cost of the private line services."⁴⁷ This practice appears to be widespread and long-standing and does not now require Commission attention.

One participant (Telenet) suggested that "sharing" be limited to an arbitrary number, say to five sharers.⁴⁸ If the sharing arrangements involved more than five users,

⁴⁶ARINC v. AT&T, 4 F.C.C. 155 (1937); Letter from FCC to Counsel for Florists' Telegraph Delivery Ass'n, Dec. 5, 1951 (FCC Pub. Notice Mimeo No. 70819, Dec. 6, 1951). Compare Letters from Acting Chief Common Carrier Bureau to Scantlin Electronics, Inc., and to Timeplex, Inc., both dated Feb. 5, 1971.

⁴⁷AT&T Tariff F.C.C. No. 260, ¶2.2.3; W.U. Tariff F.C.C. No. 254, ¶2.2.3. See Datran Tariff F.C.C. No. 1, ¶2.2.2(B); MCI Tariff F.C.C. No. 1, ¶C6.032; RCA Globcom Tariff F.C.C. No. 93, ¶2.2(B); SPCC Tariff F.C.C. No. 2, ¶2.6 (effective April 1, 1975).

⁴⁸Telenet Comments, p.23.

- 22 -

then the Commission should, according to Telenet, either prohibit sharing entirely or require Commission approval prior to expansion.⁴⁹

The Telenet proposal is an example of an innocent-appearing way in which the Commission could wreak havoc within an industry. To illustrate, suppose an industry was composed of six members in a given city. Five can share -- one is out. How has the public interest been served by freezing out the sixth? Or suppose the five largest members of a major industry decide to share, and then use FCC regulation as an excuse to exclude the others. The precise mischief which can be caused by unnecessarily imposed regulation is impossible to predict.

On the other hand, "resale" of common carrier services for profit by the new "value-added" carriers may well require some regulation. ARINC and ATA, however, join with those who urge the least regulation of these new services permissible under the Communications Act.⁵¹

⁴⁹Id.

⁵⁰See, e.g., API Comments, pp.3-4; Datran Comments, p.23; Graphnet Comments, p.6; Packet Comments, p.3; SIAC Comments, pp.51-52.

V. CONCLUSIONS

The questions raised by the Commission in its Notice of Inquiry are important and wide ranging as to the adequacy of current common carrier services and of the Commission's policies toward those carriers. The initial responses from a variety of different interests show that there is nothing fundamentally wrong with the present system of meeting each new requirement as it arises.

ARINC's customer status, recognized by domestic, international, and specialized carriers alike, has been fully justified in ARINC's and ATA's Comments, has found support from a broad range of parties, and has been subject to no reasoned opposition. ARINC's unique and historical role as the communications company of the air transport industry and the necessity for communications carriers to meet competition from an airline industry extension of ARINC's private microwave facilities confirms the validity of present service arrangements with ARINC. The extension of "single customer" status to other entities and industries, we believe, should as in the past proceed on the merits of each case.

Finally, in view of the dynamic changes taking place in the field of intercity communications, the Commission should avoid unnecessary regulatory actions which

could impede the forces of competition. With the increased flexibility of choice resulting from the Specialized Common Carrier decision and liberalized interconnection policies, the mechanisms of the marketplace should be allowed to function as freely as possible in meeting the needs of the public.

Respectfully submitted,

AIR TRANSPORT ASSOCIATION
OF AMERICA

AERONAUTICAL RADIO, INC.

February 24, 1975

REPLY COMMENTS OF
THE SECURITIES INDUSTRY AUTOMATION CORPORATION

The Securities Industry Automation Corporation (SIAC) hereby submits its reply to the initial comments filed in response to the Commission's Notice of Inquiry and Proposed Rulemaking herein, 47 F.C.C.2d 644 (1974).

Introductory Statement

The foremost principle which emerges from SIAC's review of the initial comments filed by thirty-seven diverse parties in this proceeding is that the Commission should adopt flexible policies to accommodate the wide variety, not only of currently identified user needs, but also of those that will arise as a result of the rapidly increasing use of and needs for accessible data and instantaneous communication of those data.

In the present variegated and fluid communications environment restrictive or rigid policies that might appear to be "solutions" today would be obsolete before they were finally promulgated. Hence, the Commission should not

revoke the options now offered by various carriers, such as recognition of industry "customers" and provisions for joint use arrangements. It should encourage additional new offerings by carriers to meet existing and emerging user requirements. To encourage carriers and users to develop new options to meet these ever-changing communications needs, the Commission should implement a flexible regulatory policy limiting, to the maximum extent consistent with the Communications Act, reporting requirements, certification, and other possible regulatory burdens.

Initially, SIAC notes that the terms "customer" and "single customer," "sharing," and "resale" have been used with a variety of meanings and connotations in the comments, and, therefore, is of the view that it is necessary to explain its understanding and use of these terms. SIAC believes that these terms, as defined below, are useful for the appreciation of important legal and policy distinctions applicable to the three concepts.

Customer and "Single Customer"

A "customer" for communications service refers to a person or an entity which orders service and is responsible for the payment of charges and compliance with carrier regulations. "No one may be a customer for a private line service who does not have a communications requirement of his own" See, e.g., AT&T Tariff F.C.C. No. 260 ¶2.5;

Western Union Tariff F.C.C. No. 254 ¶2.5; MCI Tariff F.C.C. No. 1 ¶B.7; RCA Globcom Tariff F.C.C. No. 93 ¶2.4. The term "single customer" is not used in any tariff, but has come to be used in the situation where one entity is recognized as the carrier's customer and other entities use the service. AT&T's and Western Union's private line tariffs* have made specific recognition of "single customer" status where the customer's request for service is reasonable but general tariff provisions against transmitting communications "for others" appear to apply in the absence of a special tariff provision. The reasonableness of serving the "single customer" may derive from a variety of considerations, including the customer's "interest" in the fact that communications are indeed transmitted apart from any specific interest in the content of a given message.

Sharing

"Sharing" means the common use of communications facilities on a non-profit, cost shared basis by the customer and other entities, often referred to in the tariffs as "joint users," for the purpose of maximizing the use and distributing the cost of facilities having a capacity greater than that needed by the customer alone. The "single customer" concept, which may also involve the sharing of

* See AT&T Tariff F.C.C. No. 260 ¶2.2.1(B)-(J); Western Union Tariff F.C.C. No. 254 ¶2.2.1(B)-(G). See also MCI Tariff F.C.C. No. 1 ¶C.6.012; RCA Globcom Tariff F.C.C. No. 93 ¶2.4(b), (c).

costs on a non-profit basis, is distinguished from "sharing" by virtue of the "single customer's" community of interest with those partaking in the use of the communications service. "Sharing," by contrast, may well involve unrelated diverse entities doing business in different industries having nothing more in common than a coincidental need for communications facilities along the same route.

Resale

Finally, "resale" is the provision of a service by the customer to unrelated third parties for a profit.

SIAC Reply Relating to Comments
on "Single Customer" Tariff Provisions

Section 201(a) of the Communications Act mandates that carriers furnish service to customers (including "single customers") who have a functional interest in communications with or by others. Further, the propriety of, and need for, FCC regulation of "customers," "sharing," and "resale" are quite different.

No party filing comments herein challenges SIAC's basic position: that the carriers have a right - indeed, an obligation under §201(a) of the Communications Act - to honor reasonable requests for service. The clear consensus of the comments is consistent with SIAC's conclusion that §201(a) requires the carriers to furnish to industry-owned

"customers," such as SIAC, which have been formed to advance, on a not-for-profit basis, the legitimate functional operations of that industry by providing communications services necessary to carry out those operations. AT&T implied general agreement with this proposition by recognizing that "special provisions" in its tariff, which specifically recognize customer needs to use communications service for industry-wide operations, "are proper in order [inter alia] to meet the realities of business." AT&T, p. 13.

Discussion of Relevant Comments

A number of comments note situations in which there is a need for coordinated, interconnected industry-wide communications. For example, electric utilities interconnected in "power pools" need a single user for communications service "to design, configure, order and administer those common carrier leased circuits which they must utilize, for the mutual control and operation of the electric utility system." Utilities Telecommunications Council, p. 11. As pointed out by ARINC, the FCC has long recognized the need for carriers to serve ARINC because "a rapid, efficient, dependable, coordinated system of communications is necessary at all times for the safety of operation of airplanes on the airways." Aeronautical Radio, Inc. v. American Telephone & Telegraph Co., 4 F.C.C. 155, 163 (1937); see ARINC, p. 55.

Other user parties have approached this issue in a similar fashion. The Associated Press showed the interest of "a cooperative organization dedicated to the collection and distribution of news . . . in the transmission of information to or from [its] members." AP, p. 9. The American Trucking Associations stated that central communications management by ATA "will allow the trucking industry to optimize its operations, select the most efficient carrier for specific services, lower cost to shippers, and offer better services to shippers and to the public." ATA, p. 26. The National Association of Motor Bus Owners stated that "communications services are used in intercity bus movements on a nationwide basis and their effectiveness in enhancing safety and efficiency depends in large degree upon coordinated operations among carriers and between geographic areas." NAMBO, p. 9. AT&T also referred to needs for "customers engaged in the buying and selling of property by auction . . . to hear and respond to each other's bids to make use of the same private line offering" and for "brokerage firms to communicate with their representatives on the floor of a stock exchange." AT&T, p. 13n.*.

There were, however, comments filed by some carriers who appear either to misunderstand the single customer concept or simply to object to the concept out of perceived self-interest. MCI, for example, does not assert that

the single customer concept is unjustified but suggests, without clear justification, that a user entity wishing to be accorded single customer status must apply to the Commission for authority and make a showing that the proposed action will serve the public interest. MCI, p. 21. MCI thus seems to regard single customer status as a privilege rather than a right, a view which is in direct contravention of the mandate of §201(a) of the Communications Act.

Congress has established by §201(a) of the Act that it is in the public interest for any entity to receive communications service upon reasonable request. The Act provides that "[i]t shall be the duty of every common carrier . . . to furnish [its] communication service upon reasonable request therefor." A heavy burden, then, is on the carriers to justify a refusal to serve an entity seeking customer status for a given use by showing that the request for service is not reasonable. Obviously, not every request by every customer for service involving others need be considered reasonable. As an example, a request for service from an entity explicitly proposing to offer a communications common carrier service without operational authority from the Commission would not be reasonable. However, the correct procedure for evaluating such customer requests for service would be a proceeding wherein the carrier must meet the burden of justifying its refusal

to serve, not MCI's topsy-turvy proposal wherein customers would bear the burden of obtaining authorization from the Commission for service.

RCA Globcom, surprisingly in view of its own broad use provisions for domestic satellite service (see RCA Globcom Tariff F.C.C. No. 93 ¶2.4 "Authorized User"), in a similar vein, seems to regard the single customer "use" provisions in AT&T's and Western Union's tariffs as "exceptions"* and states that it is unaware of "any policy considerations which would justify expanding these exceptions." RCA Globcom, p. 14. SIAC, on the other hand, believes that the policy of §201(a), that customers must be served, fully justifies any new tariff provisions which may be needed in order that the carriers may respond to reasonable service requests.

DATRAN, standing alone among the parties to this proceeding, and in a transparent attempt to obtain a protective "umbrella" from competition, urges the Commission to forbid any entity from obtaining and using common carrier services for any other separate entities except under regulated conditions. It proposes retrogressive and restrictive regulatory policies, viz:

* AT&T states that it does not regard all of its special use provisions as "exceptions" to the prohibition on resale. AT&T, p. 13.

"DATRAN urges that the Commission adopt and implement a policy that would require any legal entity, whether an individual, a partnership, a corporation or any permutation thereof, to obtain and use common carrier services only for itself and for no other separate entities unless or until it has received Commission approval under Section 214 to resell enriched primary carrier service to others, or unless or until it has effectuated bona-fide sharing arrangements." DATRAN, p. 38.

SIAC supports fully the Commission's Specialized Common Carrier decision to permit competition in the supply of communications services, but can see no justification, either in law or in policy, for adopting DATRAN's proposal artificially to create potential markets for its services. DATRAN's proposal would, for example, destroy SIAC's present ability to carry out the important responsibility of the securities exchanges to provide and maintain a modern, reliable communications system throughout the securities industry.* As shown in SIAC's initial comments herein

* "But the public in the role of investor is only part of the picture. The integrity and efficiency of the securities markets are even more important since our entire economy is dependent upon these markets. The securities market performs the essential function of assessing the value that society places upon the efforts of a particular enterprise so that society can obtain the maximum amount of its preferred goods and services that our resources can produce. This function can be performed effectively only if the delicately calibrated balance of factors affecting demand and supply are allowed to have their impact upon the market place through an unrestricted flow of information and funds." *Chris-Craft Industries Inc. v. Piper Aircraft*, 480 F.2d 341, 357 (2d Cir. 1973) (emphasis added).

(pp. 35-38), this responsibility flows from the exchanges' obligations under the Securities Exchange Act, and is a matter of high public interest.

SIAC notes that the root of DATRAN's proposal lies in DATRAN's self-interested objections to Telpak rates available to any customer, including so-called "single customers," but not to sharers or resellers. See DATRAN, pp. 35-36. SIAC submits that the scope of this proceeding as defined by the issues set forth in the Commission's Notice of Inquiry and Proposed Rulemaking encompasses neither the rate-making principles applicable to nor the rate levels of Telpak. Indeed, the Commission has those issues under investigation in Docket No. 18128, in which a Recommended Decision is now pending. DATRAN is a party to that proceeding, see FCC 71M-619 (April 20, 1971), and has submitted its views in Proposed Findings and Reply Findings therein. DATRAN's attempt to inject a rehash of Telpak rates into this inquiry is, therefore, totally inappropriate.

The fact that DATRAN would relegate present users receiving service as "single customers" either to common carrier status or restricted sharing operations betrays the retrogressive and restrictive nature of its proposal. It ignores the needs of users as well as the established Commission policy regarding cooperative industry communications.

Thus, under DATRAN's proposals, SIAC would be forced to alter the scope and nature of its operations: either seeking certification from the Commission as a common carrier, or limiting the performance of its responsibilities to establish a modern and efficient centralized communications network for the securities industry by merely arranging for the sharing of discrete physical facilities subject to unnecessary reporting requirements to the Commission.

As is shown in SIAC's initial comments, its present operations are fully in accord with sound and long-established policy permitting and even encouraging cooperative, non-profit industry communications ventures, while recognizing that these are not subject to common carrier regulation. At least as early as 1937 the Commission recognized, in the case of ARINC, the public need for a "coordinating agency" for "a rapid, efficient, dependable, coordinated system of communications" for the air transport industry which would "be maintained as a distinct organization." Aeronautical Radio, Inc. v. American Telephone & Telegraph Co., 4 F.C.C. 155, 163 (1937). SIAC's initial comments make it abundantly clear that the public interest is served by SIAC's central role in providing communications services for the securities industry, especially as the SEC's goal of a central market system becomes a reality.

Common Carrier vs. Single Customer Status

DATRAN's proposal, then, raises the question of the regulatory status of industry cooperative customers such as SIAC. As well established precedent makes clear, common carrier regulation, as suggested by DATRAN, has never been regarded as appropriate for such entities.

In the first place, as even parties such as DATRAN must concede, one of the essential hallmarks of a common carrier calling for regulation under Title II of the Communications Act is that the common carrier be "for hire." 47 U.S.C. §153(h) (1970). Thus, as DATRAN and other parties advocate, "resellers" of communications service for profit may be subject to Commission regulation. See DATRAN, p. 23. On the other hand, the Commission traditionally has considered non-profit operations not to be "for hire." As the Commission explained in Cooperative Sharing of Operational Fixed Stations, 4 F.C.C.2d 406, 417 (1966), "we have long made the distinction between persons engaged in providing service as common carriers and those rendering service on a nonprofit, cooperative basis" (emphasis added).^{*} For a more recent staff analysis of this factor compare

* Earlier precedents include the letter from FCC to Counsel for Florists' Telegraph Delivery Association, Dec. 5, 1951 (FCC Public Notice mimeo no. 70819, Dec. 6, 1951) (plan to operate private line network to handle flower orders would not appear to be a common carrier operation if, inter alia, the operation of the leased facilities is conducted on a non-profit basis).

the letters from Acting Chief, Common Carrier Bureau to Scantlin Electronics, Inc., and to Timeplex, Inc., Feb. 5, 1971, which discuss similar arrangements for the furnishing of multiplexing equipment in connection with line sharing, differing only in that the Scantlin proposal involved no profit and the Timeplex one had an element of profit. The Acting Bureau Chief ruled that the non-profit arrangement was not common carriage subject to the Communications Act but that the profit-making arrangement was a common carrier service.

A second distinguishing factor of common carriers is that, unlike SIAC, they have no interest of their own in the communications service. See, e.g., Western Union Telegraph Co., 5 R.R. 1213, 1216 (1950). SIAC's purposes in providing and maintaining communications services for the securities industry (detailed in its initial comments) are based upon fulfilling the exchanges' statutory responsibility to enhance the operational efficiency of their members, to maintain the integrity and efficiency of the securities markets, and thus to serve and protect the investing public (pp. 35-38). These purposes are clearly distinct from those of a common carrier dedicated simply to providing communications channels.

A third factor which negates the necessity or appropriateness of considering SIAC a common carrier is that

it confines its service solely to the securities industry. It does not make a public offering, whereas "carriers must serve all members of the public (generally)." Multiple Licensing--Safety and Special Radio Services, 24 F.C.C.2d 510, 519 n.2 (1970).

These precedents show that providers of industry communications services on a non-profit basis who have a functional interest in providing the service are not engaged in common carriage. In order that carriers may fulfill their duty to serve such entities, SIAC suggests that tariff language such as that now used and interpreted by MCI is the appropriate model for the carriers to use in fulfilling their service obligations.

Thus, MCI Tariff F.C.C. No. 1 provides that (except for other carriers) "no one may be a customer . . . who does not have a communications requirement of his own"* (§B.7); that "authorized users" are entities "authorized

* This should be interpreted in the light of the FCC's holding as to when a customer has a "direct interest" in communications: "It must be concluded that no interest in the content of the messages handled is necessary, but that it is sufficient if the fact that the message is sent aids the lessee [customer] in carrying out purposes of its own distinct from those of a communication carrier for hire." Aeronautical Radio, Inc. v. American Tel. & Tel. Co., 4 F.C.C. 155, 164 (1937).

by the customer to receive or send communications" (§B.1) and may be "persons, firms or corporations in the same line of business as the customer" (§C.6.012); and that service may be used "for the transmission of communications to or from an authorized user" (id.). In addition, MCI permits the customer and authorized users "to share the cost of the service." §C.6.032.

SIAC, in light of its responsibilities earlier described, is recognized by MCI as the "customer" with respect to services utilized by SIAC's industry participants, and is thus considered to have a communications requirement "of its own" within the meaning of the MCI tariff.

SIAC Reply Relating to Comments
on "Resale" and "Sharing" Issues

SIAC deferred extensive comment on questions of "resale" and "sharing" in its initial comments in view of the fact that such arrangements did not appear to be particularly significant to SIAC's present operation. The comments of other parties on these issues, in general, show that they have at best an indirect bearing on SIAC, and, therefore, SIAC's reply to these comments will be summary and will focus on factors of relative importance to SIAC.

In the first place, the carriers have raised serious questions as to the impact of unlimited resale and/or

sharing. See, e.g., AT&T, pp. 16-36; DATRAN, pp. 12-34. Moreover, the initial comments of the parties indicate no user support for a removal of all restrictions on resale or sharing.

There is, however, both on the part of carriers and users, general recognition of the need for shared use of service, particularly of discrete facilities. See, e.g., AT&T, p. 6; DATRAN, p. 27; AP, p. 7; AAR, pp. 8-9. Also, there is broad support for lessening tariff restrictions to permit sharing of greater-than-voice-grade discrete facilities. See, e.g., DATRAN, p. 28; ANPA, pp. 6-7; AAR, p. 5. While emphasizing that "sharing" is not a substitute for the right of industry customers such as SIAC to use communications services, SIAC recognizes the desirability of maintaining a variety of options for users, and the public interest in allowing sharing arrangements to avoid duplication and waste of facilities. Thus, SIAC concurs in those comments which advocate the desirability of non-profit sharing arrangements of all discrete facilities.

Conclusion

SIAC urges the Commission to recognize that it is in the public interest, and consistent with the Communications Act, to permit industries to meet their communications requirements in a variety of ways. Thus, carriers should be required to implement their duty to provide such

service, as they have in the past, by amending their tariff provisions, where necessary, to permit all customers to meet their varied, and often unique, requirements. Arbitrary restrictions on a customer's use of his service, designed only to raise a protective umbrella against competition, should not be allowed. In addition, the Commission should hesitate to impose restrictive reporting or other regulatory requirements on customers in the absence of a clear showing that these are necessary to prevent abuses. Finally, the Commission should encourage the carriers to continue and carefully broaden permitted sharing arrangements.

Respectfully submitted,

SECURITIES INDUSTRY AUTOMATION
CORPORATION

February 24, 1975



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

1268

DUPLICATE
FILE

RECEIVED

OFFICE OF THE
GENERAL COUNSEL

April 25, 1975

APR 25 1975

F. C. C.
OFFICE OF THE SECRETARY

Mr. Vincent J. Mullins,
Secretary, Federal Communications
Commission
1919 M Street, N.W.
Washington, D.C. 20554

In the Matter of

Regulatory Policies Concerning
Resale and Shared Use of Common
Services and Facilities

Docket No. 20097

RM - 1997

RM - 2218

Dear Mr. Mullins:

Enclosed herewith are the originals and twenty (20) copies of our
Petition to Intervene and our comments regarding the above-styled matter.

I regret the lateness of our filing but, as stated in our Petition, we did
not become aware of the matter until April, 1975.

Sincerely yours,

Ronald B. Guttman
Attorney-Advisor
Business and Administrative Law
Division
Office of the General Counsel

Enclosures

PETITION TO INTERVENE

1. The National Library of Medicine, a component of the National Institutes of Health, an agency of the Department of Health, Education and Welfare, hereinafter Petitioner, has a contract with Tymeshare, Inc. involving the use of shared communications lines and could, therefore, be directly affected by the proposed rule making.
2. Petitioner did not become aware of the proposed rule making until April 1975.
3. Because Petitioner was not timely aware of the proposed rule making and because said rule making could directly affect

Petitioner, Petitioner respectfully requests the Commission to allow it to intervene and submit comments regarding the above-styled action.

The National Library of Medicine,
National Institutes of Health
Department of Health, Education &
Welfare

4/25/75
DATE



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

1271 DUPLICATE

FILE

[Handwritten signature]

RECEIVED

APR 25 1975

F. C. C.
OFFICE OF THE SECRETARY

April 25, 1975

Honorable Richard E. Wiley
Chairman, Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Dear Mr. Chairman:

We have reviewed FCC Docket Number 20097 and concur with the views of the National Library of Medicine on this matter. Shared use is important to not only medical applications, but also present and potential educational and other social and public service communications activities.

Sincerely yours,

[Handwritten signature of Albert L. Horley]

Albert L. Horley, Director
Office of Telecommunications Policy

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
NATIONAL INSTITUTES OF HEALTH
NATIONAL LIBRARY OF MEDICINE

TO : Mr. Ron Cuttman, Attorney Advisor
Office of the General Counsel, DHEW

DATE: April 25, 1975

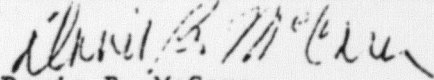
FROM : Associate Director, OCCS, NLM

SUBJECT: FCC Docket No. 20097

1. The subject Federal Communications Commission Docket No. 20097 inquiring into regulatory policies concerning resale and shared use of common services and facilities is of concern to the NLM. Our concern derives from our mandated requirement to provide a large and geographically distributed number of low volume users with access to our biomedical computerized, on-line data bases.
2. Without the shared use of common services and facilities feature of Tariff 260 the cost of providing 496 (and growing) institutions with access to our Medline, Toxline, and Cancerline data bases is prohibitive. These using institutions range from small medical libraries and other Government agencies to private industrial firms and are dispersed from Toronto, Canada to Houston, Texas and Hawaii to Paris, France.
3. Our Washington, D.C. users and some Government agencies use either local dial-up lines or FTS (Federal Telecommunications Systems) lines to access our services. Our non-Washington, D.C. users are serviced via the Tymshare, Inc. network under the Shared Use feature of Tariff 260.
4. We fully agree with the last sentence of Paragraph 19 in the Commissioner's Notice of Inquiry and Proposed Rule Making that states "We believe that sharing arrangements as are now possible result in greater access to and fuller utilization of our nation's communications capacity and we believe their continuation is warranted". Sharing Tymshare, Inc. lines has permitted us to make available highly valuable biomedical information from various archives to a large constituency concerned with our nation's health at an affordable cost. The effect of removing the joint use feature from Tariff 260 would be to sharply limit the number of biomedical institutions that could use the information in our data bases because of the resultant much higher cost. This is certainly not in the public interest.

5. It should also be considered that value-added network vendors are providing valuable services not available from the public carriers under the Tariffs. These include the capability to monitor transmissions from point-to-point and re-transmit in the case of error, thus providing much higher transmission reliability than that provided by the public carriers, the capability of providing full accounting by user of the use of network facilities and the capability of providing access to any of the computers connected to the value-added networks. So the question is not only cost but also capability. The value-added networks are providing valuable services at a moderate cost. We feel this is certainly in the public interest - especially since the public networks are being fully remunerated at their tariffed prices.

6. We request that our views be presented to the FCC in the subject Docket No. 20097.


Davis B. McCarn
Associate Director, OCCS

RESPONSE OF
THE SECURITIES INDUSTRY AUTOMATION CORPORATION

The Securities Industry Automation Corporation (SIAC), pursuant to the Commission's Notice of Inquiry and Proposed Rulemaking herein, 47 F.C.C.2d 644 (1974), hereby submits its response to the reply comments filed in this proceeding.

I. Introduction

SIAC has documented in detail its essential role in furtherance of the stock exchanges' regulatory duties to provide effective and efficient communications throughout the securities industry. No party has challenged SIAC's right under the Communications Act to receive the service from common carriers necessary to perform its vital function. Thus, the record requires that any Commission action taken in this proceeding be consistent with SIAC's right to receive the service it needs. In this response, then, SIAC will address questions raised in the replies of other parties relating to their particular interests and will

make recommendations as to how the Commission, on the basis of the record herein, can accommodate the legitimate and reasonable concerns of all participants.*

II. The Single Customer Concept

A. SIAC's Right To Receive Service

SIAC's initial comments showed that the securities exchanges are incorporated associations of their members having the responsibility of providing their members with facilities, including communications, necessary for securities trading. Moreover, under the Securities Exchange Act and SEC policy, the exchanges have a "primary responsibility" to the public to improve the operating efficiency of the securities industry. The purpose of SIAC's SECTOR communications network is to further these twin obligations of the exchanges. Thus, as demonstrated in SIAC's initial comments, SIAC, the exchanges' operating entity for communications, has an interest in the communications services and facilities which it orders from the common carriers and is entitled as a matter of right to service under §201(a) of the Communications Act.

* SIAC necessarily assumes that this round of responses will address by way of comment and recommendation the record already made by the initial comments and replies thereto. If any parties should introduce new material into the record at this point, due process would require that all participants be given an opportunity to respond to it before it is considered by the Commission.

No filing in this proceeding controverts SIAC's detailed factual presentation of how it meets its communication requirements with common carrier service or its right to receive such service.*

The only possible conclusion, therefore, which the Commission may reach is that SIAC has an interest in, and a communication requirement for, the services it obtains as the securities industry "customer," and that common carriers have a duty to furnish such service upon SIAC's reasonable request.

B. Response to Other Participants

The reply comments indicate, with few exceptions, no disagreement with SIAC's showing that the single customer concept in general, and SIAC's operation in particular, serve the public interest well. OTP's comments have made an especially effective presentation of the public benefits which flow from "brokerage," which, by OTP's definition, includes the operation of user associations. OTP particularizes the following benefits of "brokerage," all of which, as SIAC has shown in its initial comments, in fact do result from SIAC's operation (OTP Comments, pp. 48-49):

* Pages 11-26 of SIAC's comments present ample facts to distinguish SIAC's activities from those of a common carrier for hire, and Telenet's request for additional, unspecified facts (Telenet Reply, p. 13 n.6) is baseless.

- 1) Create pressure in the direction of more efficient, cost related prices on the part of common carriers.

SIAC, as the customer for the securities industry, is in a position to order service which meets the industry's particular and specialized needs at the lowest price. Thus, as OTP points out (OTP Comments, pp. 21-24) SIAC's operation serves as a "market corrective" to inconsistencies within or among the carriers' tariffs.

- 2) Allow for a more equitable distribution of communications costs and services between large and small users.

SIAC's SECTOR network is available on a not-for-profit basis to all stock exchanges and their instrumentalities, NASD, and all firms which are members of stock exchanges or NASD. Thus, all of the advantages which obtain from SECTOR's scale of operation can benefit both large and small entities within the securities industry on an equitable basis.

- 3) Draw out new and presently unrecognized communications needs through improved management and marketing techniques.

The SECTOR staff has a network management expertise which enables SIAC to serve its industry with a cost-effective communications network. In addition, SIAC's other services provide the securities industry with state-of-the-art developments in automation and communications which enhance the efficiency and quality of service to the public of the securities trading markets.

- 4) Promote more efficient utilization of plant.

By the use of multiplexing SECTOR greatly improves the utilization by the securities industry of leased channel capacity. Also, SIAC's computer systems which interconnect the various elements of the market trading system permit the consolidation of multiple channels for information exchange.

- 5) Exploit dynamically evolving technology in a timely and constructive fashion.

SIAC carries on research and development to improve operational efficiency by the use of automation techniques.

- 6) Shift the risks and rewards for market development of untested services from the conservative environment of regulated common carriage to the entrepreneurial milieu of the venture capital market.

While SIAC's not-for-profit operation would not normally be viewed as "entrepreneurial" in the above sense, SIAC does develop and implement its services with its own resources, thereby insulating the communications carriers from the risks inherent in providing necessary facilities and services for the securities industry.

In sharp contrast with OTP's forward-looking recognition of the desirability of operations such as SIAC's, several carriers adhere to the retrogressive view that the single customer concept is objectionable, and seek to eliminate it or subject it to restrictive regulation. The

selfish concerns of these carriers are not difficult to fathom. MCI, for example, indicates its hope that a Commission decision on resale, sharing, and single customer use in this proceeding will cause the "death" of AT&T's Telpak (MCI Reply, pp. 9-11), a consequence which would, of course, eliminate or lessen competitive pricing for the bulk market and permit MCI to increase its own rates. Likewise, Telenet, having only recently obtained Commission authority to operate as a "value added" common carrier, now takes the position that single customer operations such as SIAC's should, in essence, be reserved as the exclusive domain of regulated common carriers. (Telenet Reply, pp. 7-8).

The approaches of both MCI and Telenet completely ignore the fact that SIAC has a requirement for communications service which the carriers are bound to meet under §201(a). Indeed, the exchanges have a "primary responsibility" to improve and facilitate the development of efficient operations of their members (Securities Exchange Act Release No. 8335). (SIAC Comments, pp. 9, 35-38). Thus, SIAC's right to service does not depend on whether other entities or groups of entities are permitted to share or resell common carrier services and the attempt by MCI and Telenet to lump these issues together is totally

invalid. SIAC's response on these issues as well as regarding common carrier regulation of single customers appears in sections III and IV below.

C. Recommendations

The pendency of this proceeding has raised questions about the customer status of various entities to which answers have been furnished in this record.

With respect to SIAC itself, the factual showing on this record is conclusive of its entitlement to customer status and that any tariff restrictions preventing a carrier from serving SIAC would be unlawful.

As a matter of general policy, SIAC believes that a non-profit industry entity with a functional interest in providing service to its industry will normally have the requisite "interest" and "communications requirement" to demand service from the carriers. Any Commission policy statement emanating from this proceeding should, in SIAC's view, embody this principle.

With regard to entities whose customer status with various carriers remains unresolved in this proceeding, the Commission should encourage carriers to apply the principles referred to above, and should leave open the door for the development of new industry entities with

1281

organizational structures and functions entitling them to customer status. Initially, such new entities should be expected to seek service from the carrier, and only upon refusals of service resort to the Commission be necessary. By stating at the outset that the Commission will place the burden of justifying a refusal to serve on the carriers, improper refusals, and hence Commission involvement, are likely to be kept at a minimum.

III. Sharing and Resale

A. The Relation Between the Single Customer Concept and Sharing and Resale

In SIAC's view, much of the debate in this proceeding about the single customer concept is actually concerned with the questions of sharing and resale of carrier services. Thus, the focus of many comments and replies has been on the inability of user groups to share services which are offered to single customers. MCI, for example, proposes sharing and regulated resale of all services, and the elimination or restriction of the single customer concept. (MCI Reply, pp. 17-19.) Telenet, likewise, attempts to cast single customers into its proposal for regulated resale or sharing. (Telenet Reply, pp. 4, 12-13.) RPSS proposes expanded sharing as an equivalent to a broadening of single user status. (RPSS Reply, pp. 4-6.) OTP suggests unregulated and unrestricted "brokerage," which

it defines to include present concepts of sharing, resale, and single customer. (OTP Comments, pp. 1-3.)

The crucial distinction ignored by these participants is that the "single customer" has a community of interest with those partaking in the use of the communications service, whereas those engaged in mere sharing arrangements or resale need have nothing in common beyond the availability of and/or need for communications capacity. The importance of this distinction derives from the fact that §201(a) requires a carrier to serve entities with a customer interest. On the other hand, whether or not a carrier's restrictions against resale and sharing are reasonable may be subject to a broader test of reasonableness under §201(b).

Thus, the Commission may not, as suggested by some parties, prevent carriers from serving single customers as such, while requiring expanded sharing and/or resale opportunities as a "substitute." One point which these parties appear to be making is that expanded sharing and resale opportunities would permit separate, small entities to aggregate their requirements to take advantage of bulk offerings which now are usable only by larger customers. (See, e.g., OTP Comments, p. 24.) There is no assurance that this consequence would result, however, since AT&T and others have expressed concern that unlimited resale and

sharing of bulk services could result in the elimination of these offerings altogether. (AT&T Reply, pp. 5-6.) Indeed, other carriers acknowledge this with hopeful expectation, thus impairing the credibility of their purported concern for smaller customers. (MCI Reply, pp. 9-11; Telenet Reply, p. 7; Datran Comments, pp. 31-32; see Western Union Reply, pp. 6-7.)

The rate treatment of large and small users is at issue in other proceedings, not this one, and nothing on this record could possibly justify the elimination of the single customer concept, which would deny to customers who are entitled to service the right to the lowest possible rates of which they are eligible to take advantage. Whether groups of other customers, through sharing or resale, should be enabled to aggregate service requirements to become eligible for bulk rates is an independent question. To answer this question a balance must be struck between, on the one hand, the undeniable benefits of intermediary operations identified by OTP and, on the other, the possibility that unlimited sharing and resale of bulk services will destroy the effectiveness of bulk offerings, to meet competition with the attendant elimination of a common carrier service option at appropriate rates for large customers and loss of contribution from those services towards the common costs of services used by smaller customers.

B. Other Sharing and Resale Issues

Other comments relating to sharing and resale have been of only tangential concern to SIAC and its response here will be limited. OTP has shown that as a general matter the operation of intermediaries in the communications field is desirable, but there is a dearth of factual information in the record showing that present sharing and resale provisions in the carriers' tariffs are inadequate to meet the needs of customers. The parties, in particular AT&T, have in most cases also recognized that changes in the sharing and resale provisions could have some adverse impact on carriers' revenues and/or rate structure. In turn, it is argued either that such changes would be de minimis (e.g., OTP Comments, pp. 29-39); MCI Reply, pp. 13-17) or, in any event, desirable (e.g., OTP Comments, pp. 21-24; MCI Reply, pp. 9-11).

C. Recommendations

The Commission should view its options with regard to the expansion of sharing and resale as independent of its obligation to assure that the carriers serve existing customers, including single customers. In SIAC's opinion the concerns about an unlimited expansion of the sharing and resale of bulk services have not been laid to rest on this record, and it would not be in the public interest to adopt a policy which would preclude carriers from pricing their services in response to market conditions

as well as cost. In any event, there is no basis in this record, or in light of the scope of this proceeding, for any impairment of bulk service offerings by carriers or imposition of other restrictions on sharing.

Thus, with regard to sharing and resale more generally, no need for radical changes in present tariffs and carrier policies of changing tariffs to meet new user requirements seems warranted. In view of the benefits which may be expected from some increased shared use and resale, however, it would be appropriate for the Commission to announce as policy that it will consider favorably reasonable and justified proposals by carriers or users for further elimination of restrictions on sharing and resale. In considering any such proposals by users, the Commission should require the carriers to bear the burden of showing that continuation of a restriction would be in the public interest.

IV. Commission Regulation

A. Regulation of Single Customers

SIAC has already demonstrated that as a matter of law and policy, its operations as a non-profit industry cooperative are not subject to common carrier regulation. (SIAC Reply, pp. 11-14). Moreover, OTP has convincingly shown that "[c]ommon carrier regulation of value-added communications services and other brokerage and sharing

arrangements is not required as a matter of law and would be inappropriate as a matter of policy." (OTP Comments, pp. 3-4.) Thus, Telenet's assertions to the contrary (Telenet Reply, p. 7) stand refuted and deserve no further response.

The suggestions by various parties that single customers (or those engaged in sharing) be regulated or subject to reporting requirements (e.g., MCI Reply, pp. 19, 25-26; RCA Globcom Reply, p. 5; SPCC Reply, pp. 9-10; Telenet Reply, pp. 2-3, 7) appear to be grounded not on any Commission statutory authority over such entities, or any policy consideration calling for regulation, but merely on a "policing" function to monitor "unauthorized resale." In this regard a number of observations are in order.

First, SIAC believes that OTP's thoughtful analysis showing that resale activities themselves are not subject to regulation as common carriers under the Communications Act (OTP Reply, pp. 3-20) should go far to allay fears that the activities of single customers or sharers may constitute common carriage, especially those operating on a not-for-profit cost sharing basis.

Second, carrier tariffs now restrict resale of their services, and no carrier has indicated that it needs Commission regulation or reporting requirements to assist it in enforcing its tariffs.

Third, this record does not reveal that there is any practice by single customers or sharers of carrying on uncertificated common carrier operations, which surely shows that present tariff provisions and enforcement thereof by the carriers is sufficient to protect the public interest without additional action by the FCC. As OTP recommends, "[t]o the extent that limited safeguards may be deemed necessary to preserve an arm's length relationship between carriers and brokers, they can be adopted without extending the scope of common carrier regulation to the brokers themselves." (OTP Comments, p. 19.)

B. Recommendations

The FCC should refrain from imposing regulation or reporting requirements on customers or sharers, and should not foreclose the possibility that at least some forms of resale be permitted on an unregulated basis. Carrier enforcement of reasonable tariffs should continue to be relied on as the preferred method for assuring that the operations of customers, sharers, and resellers comply with established policy.

V. Conclusions

The great preponderance of the evidence in this proceeding supports the trend toward liberality and flexibility in the utilization of common carrier services. Equally affirmed are the propriety and effectiveness of industry organizations such as SIAC who bring efficiencies and economies in communications as they seek to enhance the overall effectiveness of their respective industries.

In view of the fact that the trends in common carrier tariffs seem to be proceeding in the right direction, no pervasive regulatory remedies appear necessary. Any policy statement contained in the Commission's Final Report and Order in this case, however, should commend this trend toward flexibility in use and affirm the validity of the industry "customer" concept as exemplified by SIAC.

Respectfully submitted,

SECURITIES INDUSTRY AUTOMATION
CORPORATION

April 25, 1975

